

# STRICT PRODUCTS LIABILITY REVISITED<sup>©</sup>

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This article examines the relationship between two concepts found throughout the law of products liability, defect and negligence. Traditional tort doctrine contends that, although they are sometimes used interchangeably, both concepts refer to quite distinct matters: the state of a product, on the one hand, and the nature of a manufacturer's conduct in supplying its products, on the other. The hallmark distinction between a standard of fault and one of strict liability, it is said, is that only the former requires proof of unreasonable care, whereas both require proof of a defect. Relying on developments in the United States and in Canada, the author suggests that such claims are overly sweeping in practice. In both jurisdictions, while a decisionmaker can focus exclusively on an outcome (the defendant's product) and ignore the reasons given for this result (the defendant's conduct) in determining whether or not a manufacturing defect is present, negligence concepts such as cost-benefit balancing and foreseeability of risk appear inseparable from inquiries into the defectiveness of a design or warning. Regardless of the standard of liability adopted in theory, defect and negligence thus converge in two important areas of products liability. The author reviews policy considerations and two recent appellate court decisions supporting a standard of strict liability tailored to manufacturing defects. In his view, a *prima facie* case for manufacturer liability should exist when a plaintiff demonstrates (1) that a product is dangerously different from its intended design, (2) that the defendant is responsible for the defective product's supply, and (3) that recognized damages were caused by this defect. Pursuant to their power and their duty to ensure the incremental evolution of the common law, it is argued, Canadian courts ought to openly recognize a standard of strict tort liability for manufacturing defects.

Cet article porte sur le rapport entre deux concepts clefs du droit de la responsabilité délictuelle du fabricant, le vice et la négligence. La théorie prétend que le vice traite de l'état d'un produit, tandis que la négligence traite du comportement d'un fabricant relativement à la fourniture de ses produits. De plus, la distinction entre la responsabilité stricte et un régime de responsabilité basé sur la faute est que seul le second exige la preuve d'une conduite déraisonnable, même si les deux exigent la preuve d'un vice. Utilisant des développements aux États-Unis et au Canada, l'auteur de cet article prétend que ces énoncés sont trop généraux en pratique. Dans les deux juridictions, même si un tribunal peut examiner exclusivement un résultat (le produit de la partie défenderesse) afin de déterminer si un vice de fabrication existe ou non, sans tenir compte des raisons derrière ce résultat, des concepts clefs du droit de la négligence tels la prévisibilité et l'équilibre des coûts et des bénéfices sont au coeur d'une analyse portant sur la défectuosité d'un plan ou d'une mise en garde. Ainsi peu importe le critère de responsabilité adopté en théorie, le vice et la négligence convergent dans deux domaines importants du droit de la responsabilité délictuelle du fabricant. L'auteur passe en revue des considérations de principe et deux décisions récentes rendues en appel qui appuient un critère de responsabilité stricte propre aux vices de fabrication. Selon lui, une cause d'action contre un fabricant devrait être recevable lorsque la partie demanderesse démontre 1) qu'un produit diffère de façon dangereuse de ses plans, 2) que la partie défenderesse est responsable pour la fourniture du produit défectueux, et 3) qu'un préjudice reconnu par le droit fut causé par ce vice. Suivant leur pouvoir et leur devoir de veiller à l'évolution progressive de la common law, les tribunaux canadiens devraient, selon l'auteur, reconnaître ouvertement un critère de responsabilité délictuelle stricte pour les vices de fabrication.

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## I. INTRODUCTION

Few would argue that a manufacturer who supplies a non-defective product should, absent some form of misrepresentation, be responsible in tort for damages somehow flowing from the product's use. Even in those jurisdictions in the United States which officially adhere to strict products liability, proof of defect is (and is likely to remain) an essential condition of recovery.<sup>1</sup> However, assume that the product supplied is indeed defective. For instance, a snail is found in an opaque bottle of ginger beer, a riding lawnmower's battery has uncovered terminals in very close proximity to the mower's gas reservoir, or a highly volatile and flammable floor sealer contains no warning with respect to the serious danger of using the product near a furnace pilot light.<sup>2</sup> Assume also that a consumer has suffered personal injury or damage to property as a result of this defect. Should the manufacturer in these circumstances be held liable irrespective of any negligence on its part for the portion of damages not attributable to the consumer's own fault? Stated somewhat differently, should a lack of reasonable care in supplying the defective product also be essential to a finding of liability in tort?

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<sup>1</sup> For a description of a system of manufacturer liability without defect and a convincing explanation of why such a system is neither workable nor desirable, see J.A. Henderson & A.D. Twerski, "Closing the American Products Liability Frontier: The Rejection of Liability Without Defect" (1991) 66 N.Y.U. L. Rev. 1263.

<sup>2</sup> As is readily apparent, these examples are taken, respectively, from *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) [hereinafter *Donoghue*]; *Nicholson v. John Deere Ltd.* (1986), 58 O.R. (2d) 53 (H.C.) [hereinafter *Nicholson*], *aff'd* (1989), 68 O.R. (2d) 191 (C.A.); and *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569 [hereinafter *Lambert*].

The place of negligence in Canadian law of products liability is not a novel issue in academic circles. These and comparable questions have been posed since at least the mid-1960s and our secondary materials contain numerous contributions to the debate, most notably, the persuasive works of Professor Waddams<sup>3</sup> and of Linden J.<sup>4</sup> (as he now is) supporting no-fault liability for defective products at common law.<sup>5</sup> Likewise, the Ontario Law Reform Commission in its 1979 *Report on Products Liability* recommended the enactment of legislation, supposedly making negligence irrelevant to liability, stating in part “[w]here in the course of his business a person supplies a product of a kind that it is his business to supply and the product is a defective product which causes personal injury or damage to property, that person is liable in damages.”<sup>6</sup> Despite authoritative support for reform, Canadian courts have continued without exception to base tortious liability in negligence and, more unfortunately, they have refused to discuss in an open and direct manner the legitimacy of an alternative standard. Arguably, a stricter standard of care has been judicially recognized through the years. This standard of the 1990s requires more of the manufacturer in terms of due diligence than did the standard of the 1960s. The standard, however, still falls short of strict liability because some finding of unreasonable care remains essential to liability.

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<sup>3</sup> See, for example, S.M. Waddams, *Products Liability*, 3d ed. (Toronto: Carswell, 1993) [hereinafter *Products Liability*]; S.M. Waddams, “Strict Products Liability” in F.E. McArdle, ed., *The Cambridge Lectures 1987* (Montreal: Yvon Blais, 1987) 111 [hereinafter “Strict Products Liability”]; S.M. Waddams, “Products Liability in Canadian Common Law” (1977) 12 *Thémis* 25; S.M. Waddams, “Strict Liability of Suppliers of Goods” (1974) 37 *Mod. L. Rev.* 154; and S.M. Waddams, “Strict Liability, Warranties and the Sale of Goods” (1969) 19 *U.T.L.J.* 157.

<sup>4</sup> See, for example, A.M. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993) [hereinafter *Canadian Tort Law*]; A.M. Linden, “Commentary: OLRC Report on Products Liability” (1980) 5 *Can. Bus. L.J.* 92 [hereinafter “Commentary”]; A.M. Linden, “Products Liability in Canada” in A.M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 216 [hereinafter “Products Liability”]; and A.M. Linden, “A Century of Tort Law in Canada: Whither Unusual Dangers, Products Liability and Automobile Accident Compensation?” (1967) 45 *Can. Bar Rev.* 831.

<sup>5</sup> See also G. Vukelich, “Strict Products Liability ‘Just(ice) Out of Reach’ — A Comparative Canadian Survey” (1975) 33 *U.T. Fac. L. Rev.* 46. But see R.A. Stradiotto, “Products Liability in Tort” in *Special Lectures of the Law Society of Upper Canada 1973* (Toronto: De Boo, 1973) at 189; A.R. Thompson, “Manufacturer’s Liability” (1970) 8 *Alta L. Rev.* 305; and H.P. McLaughlin & M.S. Shannon, “‘Caveat Factor’: Strict Liability and the Manufacturer” (1966) 2 *U.B.C. L. Rev.* 502.

<sup>6</sup> (Toronto: Ministry of the Attorney General, 1979) [hereinafter *Report on Products Liability*] at 135, s. 3(1) of the Draft Bill. However, the proposed legislation defines “defective product” simply as a “product that falls short of the standard that may reasonably be expected of it in all the circumstances” (*ibid.*, s. 1(1)(a)). Arguably, this definition does not render negligence irrelevant to liability, but simply makes its use more discrete.

The response of our legislatures has been likewise delayed; only New Brunswick and Quebec have legislation addressing the standard of liability in tort with respect to defective products.<sup>7</sup> Today, there appears to be little momentum for reforming this issue of products liability.

This article revisits strict products liability and argues in favour of adopting such a principle under Canadian tort law. Unlike other contributions to the debate, however, this piece addresses the interrelation between the concepts of “defect” and “negligence” in making its proposal. Before entering the realm of policy analysis and attempting to answer questions of the sort posed in the opening paragraph, one ought to examine the way in which a consumer product may be defective. Recent developments in the United States<sup>8</sup> have made at least one thing clear: a general principle that liability rests on the supply of a defective product, irrespective of reasonable care, does not necessarily translate into a pure standard of strict liability in judicial decision making. Courts and litigants must define “defective product” in order to apply such a principle. If the definition chosen incorporates elements from the law of negligence, such as cost-benefit analysis and the foreseeability of risk, the standard remains fundamentally based on fault regardless of the label assigned to it. This, in fact, occurs when the products in issue are defective because of faulty designs<sup>9</sup> or inadequate warning.<sup>10</sup> In these areas, the line between negligence and strict liability has become somewhat blurred in the United States. With respect to

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<sup>7</sup> See *Consumer Product Warranty and Liability Act* S.N.B. 1978, c. C-18.1, s. 27; and *Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1468 and 1469.

<sup>8</sup> Developments in American products liability law are fully discussed in the following symposia: “The Revision of Section 402A of the *Restatement (Second) of Torts* Occasion for Reform of Product Liability Law?” (1993) 10 *Touro L. Rev.* 1; “Tort Reform Symposium: Perspectives on the American Law Institute’s Reporters’ Study on Enterprise Responsibility for Personal Injury” (1993) 30 *San Diego L. Rev.* 213; “Tort Reform” (1992) 27 *Gonzaga L. Rev.* 153; and “Products Liability: Special Edition” (1991) 20 *Anglo-Am. L. Rev.* 183. See also: C.E. Cantu, “Twenty-five Years of Strict Product Liability Law: The Transformation and Present Meaning of Section 402A” (1993) 25 *St. Mary’s L.J.* 327; and J.A. Henderson & A.D. Twerski, “Stargazing: The Future of American Products Liability” (1991) 66 *N.Y.U. L. Rev.* 1332.

<sup>9</sup> A “design defect” becomes relevant whenever the specifications chosen by a manufacturer for a product create excessive risks of personal injury or property damage to consumers: see Part IV, below.

<sup>10</sup> A “warning defect” becomes relevant whenever the information given by a manufacturer, or the manner in which it is presented, fail to adequately impart to consumers the non-obvious risks to person and property associated with the product’s use: see Part IV, below.

manufacturing defects,<sup>11</sup> however, courts south of the border have had little difficulty in implementing true strict products liability, that is, in preventing this standard from becoming diluted through the concept of defect. In March 1992, the American Law Institute announced its plan to overhaul § 402A of the *Restatement (Second) of Torts* because “it has proven so influential in the development of modern product liability law” and its current sweeping formulation has become “increasingly irrelevant and unresponsive to contemporary needs.”<sup>13</sup> One of the issues in need of clarification, according to Henderson and Twerski, the reporters of the Third Restatement, is the complex relationship between defect, negligence, and strict liability as they relate to the various theories of manufacturer responsibility.<sup>14</sup> In my opinion, all of this speaks to the potential of both doctrine and policy in the reform of products liability.

Part II of this article contains a brief review of the role played by negligence in the development of products liability law in Canada and in the United States.<sup>15</sup> As will be shown, history reveals an ever-unfolding relationship between the concept of manufacturer negligence, on the one hand, and the manner in which courts deal with losses caused by defective products, on the other. For our purposes, this development began in the nineteenth century, where reasonable care played second fiddle to privity of contract, and is currently moving towards the view that negligence is somehow relevant when dealing with products containing defective designs or warnings, but not when dealing with manufacturing defects. More specifically, this development may be described by referring to six phases, characterized chiefly by the

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<sup>11</sup> A “manufacturing defect” becomes relevant whenever a product departs in a dangerous manner from its intended specifications, that is, when the product differs from its contemplated design in a way that is dangerous to a consumer’s person or property: see Part IV, below.

<sup>12</sup> *Restatement (Second) of Torts* § 402A(2)(a) (St. Paul: American Law Institute, 1965).

<sup>13</sup> A.D. Twerski, “From A Reporter’s Perspective: A Proposed Agenda” (1993) 10 *Touro L. Rev.* 5.

<sup>14</sup> J.A. Henderson & A.D. Twerski, “Will A New Restatement Help Settle Troubled Waters: Reflections” (1993) 42 *Am. U. L. Rev.* 1257 at 1261-66.

<sup>15</sup> For a detailed analysis, see Waddams, *Products Liability*, *supra* note 3 at 1-10; O.S. Gray, “Reflections on the Historical Context of Section 402A” (1993) 10 *Touro L. Rev.* 75; G.L. Priest, “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law” (1985) 14 *J. Leg. Stud.* 461; J.W. Wade, “Strict Tort Liability for Products: Past, Present and Future” (1984) 13 *Cap. U.L. Rev.* 335; W.L. Prosser, “The Fall of the Citadel (Strict Liability to the Consumer)” (1966) 50 *Minn. L. Rev.* 791; and W.L. Prosser, “The Assault on the Citadel (Strict Liability to the Consumer)” (1960) 69 *Yale L.J.* 1099 [hereinafter “The Assault on the Citadel”].

following events: first, the outright denial of liability in the absence of contractual privity, regardless of the presence of manufacturer negligence; second, the creation of exceptions to the privity rule for certain products and unsanctioned trading practices; third, the recognition of a general duty of care owed by the manufacturer directly to its consumers, irrespective of privity of contract, allowing an action for damages in the case of negligence; fourth, the relaxation of the negligence standard of liability in specified circumstances through a number of evidential devices such as *res ipsa loquitur*; fifth, the open adoption of a general alternative basis of liability, independent of manufacturer's fault, that is, all-encompassing strict products liability; and finally, the recognition of the limits of this new standard of liability by the application of negligence concepts in specified circumstances.

A majority of Canadian jurisdictions are dragging behind in this development, unwilling to openly embrace strict products liability. Our tort law thus evolves largely within the fourth phase. This reluctance is only partly justified. The Canadian proponents of strict tort liability, like the reformers of the late 1960s in the United States, often fail to recognize important distinctions in the grounds under which a product may be defective and the relationship between these grounds and the issue of manufacturer negligence. When these questions are addressed, as I will attempt to do in Part III, at least one conclusion will follow: only with respect to manufacturing defects, a limited area of products liability, is it possible to completely detach the question of "whether this manufacturer has exercised reasonable care" from the question of "whether the product is defective." With respect to design defects and failures to warn, the other two possible grounds for finding a product defective greatly overlap by definition. The closeness of "defect" and "negligence" in these latter areas would cause difficulties in implementing liability without fault, as distinguished from liability without defect, even if the benefit of such a change were conceded. General or all-encompassing strict products liability should therefore be avoided.

However, in Part IV I argue that, regardless of the uncertainty currently plaguing the law of defective design and of failure to warn, it is time for Canadian common law to recognize that proof of negligence is unnecessary to impose liability for manufacturing defects. Of course, there are other reasons besides a relative ease of implementation for this recommendation. That it is possible to find a manufacturer responsible in this area without saying (or implying) anything about the reasonableness of its conduct does not mean it is appropriate to do so. Part IV will thus set out the policy reasons why I believe Canadian

courts, if not legislatures, should openly adopt a standard of strict liability tailored to manufacturing defects—a move which would represent “an incremental change to the law, necessary to see that the common law develops in a manner that is consistent with modern notions of commercial reality and justice.”<sup>16</sup>

I have selected two recent appellate court decisions, *Farro v. Nutone Electrical Ltd.*<sup>17</sup> and *LeBlanc v. Oland Breweries Ltd.*<sup>18</sup> to illustrate the confined area of products liability where a standard of strict tort liability ought to be openly recognized by Canadian courts. Both cases deal with manufacturing defects, as defined herein, and both reflect the tendency of our courts in such cases to readily equate a finding of defect with a finding of negligence and to pay little, if any, attention to the care employed by the manufacturer in the fabrication of its product. For reasons given in Part V, I believe the courts of appeal for Ontario and for New Brunswick missed golden opportunities in *Farro* and *LeBlanc* to recognize the *de facto* irrelevance of negligence with respect to manufacturing defects and, hence, to revise the increasingly shallow language of our common law of products liability.

## II. NEGLIGENCE AND THE DEVELOPMENT OF PRODUCTS LIABILITY

In this part, I elaborate on each of the phases pivotal in the development of products liability from a negligence perspective. The first phase takes place during the high days of contract law, where now-unquestioned notions of concurrency between contract and tort<sup>19</sup> are lost in concerns about opening the floodgates of litigation, slippery slopes, and unlimited defendant liability. At the heart of the judicial reluctance characterizing this period is the privity rule derived from the infamous 1842 case of *Winterbottom v. Wright*<sup>20</sup>. There, a unanimous court held that a supplier of mailcoaches—who had leased a coach to the plaintiff’s employer under a contract which stipulated, *inter alia*, that the supplier had the duty to keep the coach in good repair—was not liable to

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<sup>16</sup> *London Drugs Ltd. v. Kuehne & Nagel Int’l Ltd.* [1992] 3 S.C.R. 299 at 453 [hereinafter *London Drugs*].

<sup>17</sup> (1990), 72 O.R. (2d) 637 (C.A.) [hereinafter *Farro*].

<sup>18</sup> (1994), 142 N.B.R. (2d) 287 (C.A.) [hereinafter *LeBlanc*].

<sup>19</sup> For a recent reaffirmation of concurrency, see *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* [1993] 1 S.C.R. 12.

<sup>20</sup> 152 E.R. 402 (Ex. Pl.) [hereinafter *Winterbottom*].

the plaintiff driver who was injured when the coach collapsed by reason of a defective axle. The reasons given by the court contain much language suggesting that fear of a downpour of litigation and of exposing defendants to unlimited liability strongly motivated the decision.<sup>21</sup> The facts and pleadings suggest that the *ratio decidendi* could have been limited to the rule that A cannot sue B for breach of a contract between B and C, to which A is not a party.<sup>22</sup> The decision appears to be silent on the proposition that B could owe a duty of care in tort to A, independent of B's contract with C or concurrent thereto, and upon which A could sue.<sup>23</sup> Notwithstanding this, *Winterbottom* was generally interpreted in a wider sense, postponing the acceptance of this latter argument. Thus, in Canada and the United States, the general rule developed that the manufacturer of a defective product, irrespective of its negligence, owed a duty of care only to those with whom it shared privity of contract. With an expanding market, a greater number of individuals came between the manufacturer and the ultimate consumer of its products, thereby breaking privity of contract and greatly limiting the consumer's remedies.

Fortunately, this rule was not always rigidly applied. The second phase includes situations which arose before and after *Winterbottom* where, notwithstanding a lack of privity, the plaintiff was allowed to sue the defendant in tort for damages caused by a defective product supplied by the latter. Judicially created "exceptions" allowed a duty to arise between a manufacturer and a distant consumer. The exceptions did not, however, alter the nature of the duty owed. This remained a duty to exercise reasonable care. Hence, even if an exception applied, the plaintiff was required to prove manufacturer negligence. Undoubtedly the most significant of these exceptions, and the one whose remnants may still be found in some recent decisions,<sup>24</sup> is the duty of care pertaining to so-called "inherently" dangerous chattels or goods such as

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<sup>21</sup> *Ibid.* at 417, Abinger L.J.; and at 418, Alderson L.J.

<sup>22</sup> See F. Bohlen, *Studies in the Law of Torts* (Indianapolis: Bobbs-Merrill, 1926) at 76-80; and J.G. Fleming, *The Law of Torts* 8th ed. (Sydney: Law Book, 1992) at 481-82.

<sup>23</sup> But see C.A. Wright, A.M. Linden & L.N. Klar, *Canadian Tort Law: Cases, Notes and Materials*, 9th ed. (Toronto: Butterworths, 1990), c. 16 at 16-8/9; and the final sentence of Abinger L.J.'s reasons where he refers to the action as being one "of tort": *Winterbottom supra* note 20 at 418.

<sup>24</sup> See, for example, *Nova Scotia (Government Services) v. Picker Canada Ltd.* (1989), 92 N.S.R. (2d) 385; and *Moore v. Cooper Canada Ltd.* (1990), 2 C.C.L.T. (2d) 57 (Ont. H.C.).

poison, sulphuric acid, dynamite, and deadly weapons.<sup>25</sup> The validity and necessity of differentiating these products for special treatment was often questioned,<sup>26</sup> especially when some courts expanded the category to include food and beverages which by nature could not be dangerous unless defectively made or prepared (*i.e.*, they required some externality to make them dangerous). This differentiation was ultimately abandoned in favour of the general rule of liability for negligence recognized in *MacPherson v. Buick Motor Co.*<sup>27</sup> and *Donoghue* discussed below. Today, the distinction should only be a reminder that the inherent nature of a danger, though no longer itself capable of triggering a duty of care, is a relevant factor in deciding whether a duty arises and in determining its nature and extent.<sup>28</sup> The other exceptions to the rule of privity derived from *Winterbottom* involved mostly dishonest trading practices. These included cases where the person supplying the goods had knowingly made a false representation as to the safety of the product,<sup>29</sup> where the supplier knew of the defect and wilfully concealed it,<sup>30</sup> and where the supplier, although aware of a defect in the product, failed to adequately warn the plaintiff of the defect.<sup>31</sup> In each of these situations, the plaintiff was allowed to sue the manufacturer for negligence, notwithstanding the absence of privity.

The third phase in the development of liability in tort for defective products witnessed simultaneously the rejection of privity and the adoption of a general rule. This general rule engulfed the earlier exceptions to privity and allowed consumers to sue manufacturers directly for breach of a duty of care. The leading decision in the United States was *MacPherson*, where the ultimate purchaser of an automobile, injured when a defectively manufactured wheel collapsed, was allowed to

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<sup>25</sup> For a list of cases invoking this exception, see W.T.S. Stalleybrass, "Dangerous Things and the Non-Natural User of Land" (1929) 3 Camb. L.J. 376 at 379-81.

<sup>26</sup> *Hodges & Sons v. Anglo-American Oil Co.* (1922), 12 Lloyd's Rep. 183 at 187 (C.A.); and *Chapman v. Saddler & Co.*, [1929] A.C. 584 at 599 (H.L.), Dunedin L.J.

<sup>27</sup> 111 N.E. 1050 (N.Y. 1916) [hereinafter *MacPherson*].

<sup>28</sup> See *Rae v. T. Eaton Co.* (1961), 45 M.P.R. 261 (N.S.S.C.); and *Allard v. Manahan*, [1974] 3 W.W.R. 588 at 596-97 (B.C.S.C.).

<sup>29</sup> See, for example, *Langridge v. Levy* (1837), 150 E.R. 863 (Ex.); and *Lewis v. Terry*, 43 P. 398 (Cal. 1896).

<sup>30</sup> See, for example, *Kuelling v. Roderick Lean Mfg. Co.* 75 N.E. 1098 (N.Y. 1905); and *Huset v. J.I. Case Threshing Machine Co.* 120 F. 865 (8th Cir. 1903).

<sup>31</sup> See, for example, *Heaven v. Pender* (1883), 11 Q.B.D. 503 (C.A.); *Gerkin v. Brown & Sehler Co.*, 143 N.W. 48 (Mich. 1913); *Nokes v. Kent Co.* (1913), 4 O.W.N. 665 (H.C.); and *Ross v. Dunstall* (1921), 62 S.C.R. 393 [hereinafter *Ross*].

sue the manufacturer for negligence in the production process. The principle advanced by Cardozo J. treats all manufacturer/consumer relationships alike and eliminates the need to underscore the so-called inherently dangerous products at the stage of determining whether a duty is owed. His reasons are not free of difficulties, however, as he speaks in terms of “thing[s] of danger” and requires the assessment of a number of foreseeability factors in determining whether a duty of care arises. These factors include the manufacturer’s “probable” knowledge of the danger, knowledge that people other than the immediate buyer will use the product, and the “proximity or remoteness of the relation” between the parties.<sup>32</sup> Under this analysis, the manufacturer’s duty (if it arises) is not absolute; it is a duty to “make [the product] carefully.”<sup>33</sup>

The counterpart in Canada and in the rest of the Commonwealth, in terms of its influence, is undoubtedly the 1932 House of Lords decision in *Donoghue*.<sup>34</sup> There, a consumer was allowed to sue a manufacturer directly in tort, notwithstanding the absence of privity, after allegedly finding a snail in a bottle of ginger beer, an obvious manufacturing defect. As in *MacPherson*, the main issues in this case are whether a manufacturer can owe a duty of care to a consumer independently of contract, and, if so, in what circumstances. Atkin L.J. held, generally, that a duty to exercise reasonable care arises between “neighbours;” it arises in circumstances where the plaintiff is so closely and directly affected by the defendant’s act that the latter ought reasonably to have the former in contemplation as being affected when his or her mind is directed to the acts or omissions which are now in question.<sup>35</sup> Atkin L.J. had no difficulty finding that consumers were neighbours to manufacturers. However, he proceeded to set out a pivotal principle to determine in what circumstances a manufacturer owes a duty to take “reasonable care.” The relevant factors are: (1) the manufacturer’s intention to have its products “reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination;” and (2) the manufacturer’s knowledge “that the absence of reasonable care in the preparation or

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<sup>32</sup> *Supra* note 27 at 1054-55.

<sup>33</sup> *Ibid.* at 1055. For instance, the defendant in *MacPherson* was found negligent as the defect in the wheel could have been discovered by a reasonable inspection, which it failed to perform.

<sup>34</sup> *Supra* note 2. But see *Canadian Tort Law*, *supra* note 4 at 548-49; *Ross*, *supra* note 31; and P. Legrand, Jr., “En relisant *Ross c. Dunstall*” (1991) 22 *Rev. Gén.* 303.

<sup>35</sup> *Donoghue*, *supra* note 2 at 580-81.

putting up of the product will result in an injury to the consumer's life or property."<sup>36</sup>

By eliminating the rule of privity, these landmark decisions and the exceptions they rendered obsolete solved one potential problem facing a plaintiff in a products liability action. Neither of them, however, altered the standard of liability used to judge the manufacturer's conduct. Instead, they confirmed that a manufacturer only owed a duty to exercise reasonable care to its consumers, and that a plaintiff was required to prove negligence in order to succeed. Naturally, this requirement created difficulties for the plaintiff, especially when defects in the manufacturing stage were alleged. There, either the manufacturer alone possessed the information required to establish lack of reasonable care in the making of its product, or this information was nowhere to be found. Furthermore, when the product was one of use rather than consumption, many alternative explanations for the defect were raised in defence, such as wear and tear, inadequate use or maintenance, or faulty repairs.

During the fourth phase in the development of products liability, courts in Canada and the United States struggled with these difficulties as they began to address the ultimate issue in suits of this kind: which party, as between an innocent consumer and a possibly negligent manufacturer, should bear the losses caused by products containing (manufacturing) defects? On this issue, policies such as ensuring compensation for injured plaintiffs and protecting consumers from harm would often tilt the balance in favour of the plaintiff. However, short of abandoning negligence as an element of the tort, courts needed some means to translate instinctive policy determinations into concrete judgments. For this, many used (and in some jurisdictions still use) a variety of evidential techniques, alone or in conjunction, such as relying heavily on circumstantial evidence of negligence, relaxing the requirements of the maxim of *res ipsa loquitur*, and using general inferences of negligence.<sup>37</sup>

As a result of MacMillan L.J.'s *obiter dictum* in *Donoghue*,<sup>38</sup> there was some confusion in Canada as to whether *res ipsa loquitur* or other

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<sup>36</sup> *Ibid.* at 599.

<sup>37</sup> For a detailed analysis of these devices and their application to products liability, see Fleming, *supra* note 22 at 485-88; *Products Liability*, *supra* note 3 at 58-62; D.W. Noel & J.J. Phillips, *Products Liability*, 2d ed. (St. Paul, Minn.: West, 1982) at 745-60; and M.S. Shapo, *The Law of Products Liability*, 2d ed. (Salem, N.H.: Butterworth, 1990), c. 24.

<sup>38</sup> *Supra* note 2 at 622.

evidential shortcuts could be used in a products liability action.<sup>39</sup> In 1936, however, the Judicial Committee of the Privy Council, in the case of *Grant v. Australian Knitting Mills*,<sup>40</sup> began demystifying the requirement of negligence and cleared the way for the use of these devices in the absence of direct evidence. Although the Privy Council wrote mostly in terms of negligence being inferred generally from the proof of the defect coupled with the surrounding circumstances,<sup>41</sup> many subsequent courts resorted specifically to *res ipsa loquitur*.<sup>42</sup> Today, the debate about when to invoke circumstantial evidence, *res ipsa loquitur*, or a general inference of negligence is largely overlooked by Canadian courts and commentators. The choice of one evidential device over another has not, to date, created many practical difficulties. Courts appear to adopt an *ad hoc* approach where they decide, on the basis of the available evidence of negligence and the circumstances of the case, whether it is just to hold the manufacturer responsible for the losses caused by its product.<sup>43</sup> The same can be said about the debate as to whether these devices shift the burden of proof on the defendant with respect to negligence (*i.e.*, the risk of non-persuasion) or merely impose a burden of going forward with sufficient evidence to meet or rebut a presumption of negligence. Writing about the Canadian situation, Waddams and the Ontario Law Reform Commission observe that a plaintiff who proves that a product is defective and has caused the damages complained of rarely loses on the ground of failing to establish the manufacturer's negligence.<sup>44</sup> These evidential shortcuts have greatly contributed to this phenomenon, at least when manufacturing defects are involved.<sup>45</sup>

Similar observations may be made about the situation in the United States prior to the adoption of strict tort liability. The majority opinion in *Escola v. Coca Cola Bottling Co*<sup>46</sup> shows how the maxim of *res*

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<sup>39</sup> See, for example, *Willis v. Coca Cola*, [1934] 47 B.C.R. 481 (C.A.).

<sup>40</sup> [1936] A.C. 85 (P.C.) [hereinafter *Grant*].

<sup>41</sup> *Ibid.* at 101, Wright L.J.

<sup>42</sup> See *Arendale v. Canada Bread Ltd.*, [1941] O.W.N. 69 (C.A.); and *Zepp v. Coca-Cola Ltd.*, [1955] O.R. 855 (C.A.), to name but two examples.

<sup>43</sup> For more examples, see *Farro*, *supra* note 17; and *LeBlanc*, *supra* note 18, discussed under Part V, below.

<sup>44</sup> *Products Liability*, *supra* note 3 at 58; and *Report on Products Liability*, *supra* note 6 at 17.

<sup>45</sup> With few exceptions, devices such as *res ipsa loquitur* are only resorted to when manufacturing defects are alleged.

<sup>46</sup> 150 P.2d 436 (Cal. 1944) [hereinafter *Escola*].

*ipsa loquitur* was used to attribute the costs of products with (manufacturing) defects to their manufacturer, without having to openly abandon the requirement of negligence. The concurring reasons of Traynor J. therein,<sup>47</sup> who would have taken this last step, also give a preview of the imminent conceptual revolution. Evidential devices are still used in the United States; however, their importance has somewhat diminished since the coming of strict tort liability.

The fifth phase in the development of liability in tort for defective products marks a break between the official approaches used in Canada and the United States. Starting in 1963 with *Greenman v. Yuba Power Products Inc.*,<sup>48</sup> American courts began accepting the proposition that a “manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”<sup>49</sup> The principal arguments for abandoning the negligence requirement are found in Traynor J.’s concurring reasons in *Escola*,<sup>50</sup> and are adopted by the Supreme Court of California in *Greenman*. These reasons include the following: (1) the manufacturer is in the best position to avoid the risks of injury by taking preventive measures; (2) the loss may be overwhelming for the plaintiff, but the manufacturer can procure insurance and distribute the loss to society as a cost of doing business; (3) regardless of negligence, the manufacturer is responsible for products placed on the market and should bear the loss; (4) it is often difficult for the injured person to establish negligence; (5) the trier of fact often applies, in effect, strict liability *via* the use of evidential shortcuts such as *res ipsa loquitur*; (6) many statutes already endorse a strict liability rule in the case of food products; (7) the current rule allowing the plaintiff to sue the retailer for breach of warranty<sup>51</sup> but not the manufacturer is needlessly circuitous and engenders wasteful litigation; (8) in food products cases, many courts have extended the warranty from the manufacturer to the consumer, thus allowing the latter to sue the former directly for breach of warranty; (9) sales warranties serve the purposes of deterrence and compensation “fitfully at best;” and (10) greater reliance is placed by society on manufacturers

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<sup>47</sup> *Ibid.* at 440.

<sup>48</sup> 377 P.2d 897 (Cal. 1963) [hereinafter *Greenman*].

<sup>49</sup> *Ibid.* at 900.

<sup>50</sup> *Supra* note 46 at 440-44. See also “The Assault on the Citadel,” *supra* note 15.

<sup>51</sup> Negligence is immaterial in such an action: “The Assault on the Citadel,” *ibid.*; and “Strict Liability, Warranties and the Sale of Goods,” *supra* note 3.

as consumers lack the means and skills to fully investigate every product, because their vigilance is lulled by advertising and market devices. Unlike in *Escola*, the facts in *Greenman* suggest that a defective design was also responsible for the plaintiff's injuries. As in *Escola*, however, Traynor J. did not expand on the concept of "defect" other than to conclude by noting that a "defect in design and manufacture" is the prerequisite to strict products liability. In 1965, the American Law Institute made public the *Restatement (Second) of Tort* which espoused in § 402A a general rule of strict liability for those who sell products "in a defective condition unreasonably dangerous to the user or consumer" or to his or her property. This rule does not expressly distinguish between various types of defects when stating that it applies "although the seller has exercised all possible care in the preparation and sale of his product,"<sup>52</sup> that is, when rejecting negligence as the appropriate standard of liability. By "defective condition," § 402A means a "condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him"<sup>53</sup> whereas by "unreasonably dangerous," § 402A means "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."<sup>54</sup> Most American jurisdictions, either judicially or legislatively, have now adopted some form of general strict liability based in tort, along the model suggested by the American Law Institute.<sup>55</sup>

Despite this remarkable development, the "strict tort liability 'explosion' [in the United States] has not caused so much as a ripple on our placid Canadian waters."<sup>56</sup> To be sure, the possibility of suing the retailer for breach of warranty and the availability of evidential devices in tort actions against the manufacturer go a long way towards implementing *de facto* strict products liability in Canada. However, the Canadian approach arguably still falls short in many respects when compared to open strict tort liability. For example, a suit is not always possible against a retailer as he or she may be insolvent, absent, or

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<sup>52</sup> *Supra* note 12.

<sup>53</sup> *Ibid.*, comment g.

<sup>54</sup> *Ibid.*, comment i.

<sup>55</sup> See "State Chart—Acceptance of Strict Liability," 1 Products Liability Rep. (C.C.H.) ¶ 4016 (November 1988-April 1989). Currently, thirty-seven states and the District of Columbia adopt the Restatement's version of strict tort liability while eight states and Puerto Rico recognize variations of § 402A. Only Delaware, Massachusetts, Michigan, North Carolina, and Virginia have yet to adopt strict tort liability.

<sup>56</sup> *Canadian Tort Law*, *supra* note 4 at 576.

beyond the jurisdiction of the courts. Furthermore, Canadian courts have not been as willing as their counterparts in the United States to dispense with the requirements of horizontal and vertical privity of contract in warranty actions. Consequently, except in the three provinces where the legislatures have intervened,<sup>57</sup> the general rule in Canada is that only a seller can be liable for breach of warranty (vertical privity), and only to a buyer (horizontal privity). Finally, in tort actions against manufacturers, differences exist between a standard of negligence and one of strict liability, despite *res ipsa loquitur* and other devices<sup>58</sup>: the requirement of negligence extends the litigation process causing delays, expenses, and disincentives to sue; the inference of negligence suggested by the maxim arguably applies only against the manufacturer and not the wholesaler, repairer, or retailer who have less control of the product and its instrumentalities; the state of the art defence may excuse a manufacturer on the ground that it took all reasonable care based on the knowledge at the time of production; and, where the defect is caused by a component part manufactured by someone other than the defendant manufacturer, it is harder, although not impossible,<sup>59</sup> to infer negligence against the latter.

The sixth phase in the development of products liability offers some reassurance to Canadian courts and legislatures. Indeed, the implementation of general strict liability has faced its share of obstacles in the United States. Thirty years of experience since *Greenman* and § 402A of the *Restatement (Second) of Torts* have demonstrated that disregarding a standard of fault is not as simple as perhaps originally estimated by American (and Canadian) proponents of strict products liability. The regime in the United States has recently come under intense scrutiny and, fuelled by various concerns related to the cost of litigation, a growing number of commentators and courts are calling for important reforms to the law of products liability.<sup>60</sup> To be sure, many of

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<sup>57</sup> See *Warranties on Consumer Products Act* R.S.S. 1978, c. C-30, s. 14; *Consumer Product Warranty and Liability Act* S.N.B. 1978 c. C-18.1, s. 23; and *Consumer Protection Act, 1978* S.Q. 1978, c. 9, s. 53.

<sup>58</sup> See *Products Liability*, *supra* note 3 at 61-62; and Fleming, *supra* note 22 at 486-88.

<sup>59</sup> As shown by both *Farro*, *supra* note 17; and *LeBlanc*, *supra* note 18, discussed under Part V, below.

<sup>60</sup> See, for example, A. Schwartz, "The Case Against Strict Liability" (1992) 60 *Fordham L. Rev.* 819; J. Cirace, "A Theory of Negligence and Products Liability" (1992) 66 *St. John's L. Rev.* 1; G.L. Priest, "Can Absolute Manufacturer Liability Be Defended?" (1992) 9 *Yale J. on Reg.* 237; D. Beyleveld & R. Brownsword, "Impossibility, Irrationality and Strict Product Liability" (1991) 20 *Anglo-Am. L. Rev.* 257; and W.C. Powers, "A Modest Proposal to Abandon Strict Products Liability" [1991] *U. Ill. L. Rev.* 639. The judiciary's changing attitude towards strict products

these criticisms are addressed to issues neither logically nor legally tied to the standard of liability used to judge the manufacturer's responsibility.<sup>61</sup> However, strict liability *per se* has not been exempt from this scrutiny. In particular, when interpreting "defective condition" and "unreasonably dangerous," two key notions purposefully left vague in § 402A of the *Restatement (Second) of Torts* many courts and commentators have given *de facto* recognition to the limitations of a generalized standard of strict liability by incorporating into their definitions elements more commonly associated with a negligence-based inquiry. Interestingly, this phenomenon occurs almost exclusively when courts are seised with products containing defects attributable to their designs or lack of warnings. In jurisdictions officially adhering to strict liability, a majority of courts now openly resort to some form of cost-benefit balancing with respect to design defects<sup>62</sup> and to foreseeability of risk for failure to warn<sup>63</sup>—elements which are central to the law of negligence. Hence, in these areas there is a valid debate as to whether a meaningful distinction exists between a standard of strict liability and the alternative standard based in fault.<sup>64</sup> Stated somewhat differently, it is

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liability is fully canvassed in J.A. Henderson & T. Eisenberg, "The Quiet Revolution in Products Liability: An Empirical Study of Legal Change" (1990) 37 U.C.L.A. L. Rev. 479; and T.M. Schwartz, "Product Liability Reform by the Judiciary" (1992) 27 Gonzaga L. Rev. 303 [hereinafter "Reform by the Judiciary"]. Legislatures have responded in various ways to this wave of criticism: see the useful table of tort reform legislation adopted by states in L. Lipsen, "The Evolution of Products Liability as a Federal Policy Issue" in P.H. Schuck, ed., *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* (New York: W.W. Norton, 1991) 247 at 262-69; and G. Blakmon & R. Zeckhauser, "State Tort Reform Legislation: Assessing Our Control of Risks" in Schuck, ed., *ibid.* at 272.

<sup>61</sup> They include issues such as the jury system, the assessment of damages, the availability of a defence, limitation periods, joint and several liability, the collateral source rule, and rules discouraging frivolous claims.

<sup>62</sup> See J.A. Henderson & A.D. Twerski, "A Proposed Revision of Section 402A of the *Restatement (Second) of Torts*" (1992) 77 Cornell L. Rev. 1512 at 1520 and 1532-34. See, generally, M.J. Davis, "Design Defect Liability: In Search of a Standard of Responsibility" (1993) 39 Wayne L. Rev. 1217.

<sup>63</sup> See "Annotation, Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger" (1984) 33 A.L.R. (4th) 368 at 371; *Fibreboard Corporation v. Fenton*, 845 P.2d 1168 (Colo. 1993) [hereinafter *Fibreboard Corp.*]; *Shanks v. The Upjohn Company*, 835 P.2d 1189 (Alaska 1992); *Owens-Illinois Inc. v. Zenobia*, 601 A.2d 633 (Md. Ct. App. 1992); and *Anderson v. Owens-Corning Fiberglas Corp.* 810 P.2d 549 (Cal. 1991) [hereinafter *Anderson*].

<sup>64</sup> See G.T. Schwartz, "Foreword: Understanding Products Liability" (1979) 67 Cal. L. Rev. 435 at 462-63; and G.T. Schwartz, "The Vitality of Negligence and the Ethics of Strict Liability" (1981) 15 Ga. L. Rev. 963 at 972-73. With respect to design defects, see also F.J. Vandall, "'Design Defect' in Products Liability: Rethinking Negligence and Strict Liability" (1982) 43 Ohio St. L.J. 61; S.L. Birnbaum, "Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence" (1980) 33 Vand. L. Rev. 593; and W.P. Keeton, "Products Liability—Design Hazards and the Meaning of Defect" (1979) 10 Cumb. L. Rev. 293. With respect to failure

now open to question whether courts in the United States and Canada are, in reality, adopting different approaches with respect to design and warning defects and, if not, whether their common ground may be found elsewhere than in strict liability.

Manufacturing defects, on the other hand, have presented fewer conceptual difficulties in strict liability jurisdictions.<sup>65</sup> As will be argued under Part III, below, a clear line has always divided the issues of “negligence” and “defect” with respect to manufacturing defects, unlike when design defects and failure to warn are involved. The concept of a defect in the manufacture of a product is relatively simple and, by definition, makes irrelevant any reference to the conduct or mental process of the manufacturer or to a balancing of competing interests. Thus, it is easy to see what is removed from the analysis when a move to strict liability is made; in negligence, the plaintiff must prove not only a manufacturing defect (*e.g.*, the presence of a snail in a bottle), but also negligence on the part of the manufacturer *vis-à-vis* said defect (*e.g.*, failure to take adequate preventive measures such as quality control testing and continual monitoring of the production line). In this respect, there are hundreds of decisions involving *res ipsa loquitur* which exemplify this distinction by bridging the gap, which does exist, between the two concepts. Accordingly, the implementation of strict liability in this field has been relatively simple: courts sometimes struggle in applying the definition of manufacturing defects to the facts before them, but they rarely express difficulty in accounting for the alternative basis of liability. Here, even though the distinction between the approaches used by courts in the United States and Canada is also questionable,<sup>66</sup> the pull is clearly in the opposite direction than with respect to design and warning defects; that is, the move is towards the American standard of liability where proof of manufacturer negligence is unnecessary.

This latest phase in the development of products liability from a negligence perspective is often ignored by Canadian proponents of strict liability. They usually speak of this standard in very general terms, not unlike *Greenman* and § 402A of the *Restatement (Second) of Torts* and

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to warn, see also Note, “The Move Toward a Negligence Standard in Strict Products Liability Failure to Warn Cases” (1989) 27 *Duquesne L. Rev.* 755; A. Gershonowitz, “The Strict Liability Duty to Warn” (1987) 44 *Wash. & Lee L. Rev.* 71; M.J. Bromberg, “The Mischief of the Strict Liability Label in the Law of Warnings” (1987) 17 *Seton Hall L. Rev.* 526; and Note, “Is There a Distinction Between Strict Liability and Negligence in Failure to Warn Actions” (1981) 15 *Suffolk U.L. Rev.* 983.

<sup>65</sup> Twerski, *supra* note 13 at 9-12; and Henderson & Twerski, *supra* note 62 at 1515-20.

<sup>66</sup> Because of the use by Canadian courts of *res ipsa loquitur* and other evidential devices.

overlook important differences between the three recognized categories of defects which surface when implementing strict liability. Thus, as noted elsewhere,<sup>67</sup> the recommendations made tend to overly generalize the necessity and practicality of adhering to such a theory, and fail to take into account the more recent experience in the United States. In my view, this phase provides the necessary impetus for revisiting the debate on Canadian strict products liability. For reasons given under Part III, I believe that, irrespective of the uncertainty currently plaguing the law of defective design and of failure to warn, it is time for Canadian courts to rejoin their American counterparts by openly recognizing that proof of negligence is unnecessary to impose liability for manufacturing defects. First, I review some definitions of the three main categories of product defects.

### III. DEFECTS IN MANUFACTURE, DESIGN, AND WARNING

Virtually everyone agrees that in order to give rise to liability in tort, a manufacturer's product must have somehow been defective when the plaintiff's personal injury or property damage occurred. There is much debate as to what other elements must be proved, primarily as to whether lack of reasonable care in relation to this defect is required. However, absent some form of misrepresentation, it is undisputed that a *sine qua non* of liability, whether such liability is based in negligence or not, is the notion of defect: "the notion that the product in question has fallen short of what it ought to have been."<sup>68</sup> In what circumstances, then, will tort law label a product defective? What must be proved by the plaintiff in order to establish this universal prerequisite to liability?

It would be very difficult to describe *a priori* every conceivable way in which a given product may fall short of what it ought to have been. There must be thousands of reasons why, for instance, a lawnmower may in certain circumstances be defective. Nonetheless, according to a viewpoint to which this author adheres, it is both possible and useful to classify product defects in three general categories.<sup>69</sup> Case law suggests that a tort action involving a product will most often be based on one or more of the following theories: (1) the unit at issue (*i.e.*,

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<sup>67</sup> D.W. Boivin, "Negligence, Strict Liability, and Manufacturer Failure to Warn: On Fitting Round Pegs in a Square Hole" (1993) 16 Dalhousie L.J. 299 at 302-04.

<sup>68</sup> *Products Liability*, *supra* note 3 at 38.

<sup>69</sup> See, generally, W.P. Keeton, "The Meaning of Defect in Products Liability Law—A Review of Basic Principles" (1980) 45 Missouri L. Rev. 579.

the specific product that caused damage to the plaintiff) fails to meet the specifications espoused by its manufacturer with respect to products of its kind; (2) the specifications adopted by the manufacturer are themselves flawed, leading to a line of unreasonably dangerous products of which the unit at issue is representative; and (3) a lack of correlation exists between a non-obvious danger related to the product at issue (or sometimes the particular unit) and the safety information communicated by its manufacturer. In other words, the product is said to be defective because of poor manufacturing, poor design, and/or lack of warning.<sup>70</sup> Thus, depending on the focus of the argument, a product liability action is usually described as involving either a “manufacturing defect,” a “design defect,” or some “failure to warn.” I shall offer some straightforward examples before attempting to define these concepts.

The case of *Donoghue*,<sup>71</sup> where a consumer allegedly found a snail in an opaque bottle of ginger beer, offers a classic example of a manufacturing defect. There, the plaintiff’s theory was that the particular unit she came in contact with (*i.e.*, the bottle of ginger beer) was defective because it fell short of its manufacturer’s own specifications for products of its kind. The defendant was not in the business of manufacturing ginger beer with mollusc parts; it was in the business of manufacturing quality ginger beer, free of unintended properties. Because the presence of this foreign substance was not planned (*i.e.*, it was not part of the product’s design), the plaintiff’s theory proceeded to suggest that the defect was somehow linked to the product’s manufacturing process; that is, the snail made its way into the unit at some point between the design of the product and its supply to the market. This type of defect may be contrasted with the one involved in *Nicholson*,<sup>72</sup> where a riding lawnmower caught fire while being refuelled. There, the product was not challenged on the ground of somehow failing to meet its manufacturers specifications. The lawnmower the plaintiffs had purchased was exactly what it was supposed to be, at least from the viewpoint of its manufacturer’s requirements. Rather, the theory of the case was based on a problem

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<sup>70</sup> J.J. Phillips argues that “misrepresentation” constitutes a fourth possible theory: see “A Synopsis of the Developing Law of Products Liability” (1978) 28 Drake L. Rev. 317 at 343-52; and Noel & Phillips, *supra* note 37. This theory is not discussed in this article because, standing alone, a misrepresentation cannot render a product “defective.” A bag containing arsenic and wrongly labelled as containing salt creates an unreasonable risk of injury, but does not in any way affect the nature of the product being sold. In my view, such a theory concerns the law of negligent and fraudulent misrepresentation, more than the law of products liability.

<sup>71</sup> *Supra* note 2.

<sup>72</sup> *Supra* note 2.

with the specifications themselves. It was argued (and accepted by the court) that the product's battery, which contained uncovered terminals, was in too close proximity with its gas reservoir, thereby creating an unreasonable risk of fire. This was the case not only with the plaintiff's unit, but with every single lawnmower of similar design manufactured by the defendant. The plaintiff's theory suggested that a safer and reasonable alternative existed and that the product's design was thus, in itself, defective. In other words, according to this argument, the product fell short of what it ought to have been, rather than of what it was supposed to be. As for the failure-to-warn theory, a fine example is provided by *Lambert*,<sup>73</sup> where a fire was caused when fumes of a highly volatile and flammable sealer came into contact with a furnace pilot light. In this case, the plaintiff's theory was neither that the product failed to meet any of the manufacturer's specifications nor that its design was somehow unreasonably dangerous. Rather, the product was exactly what it was supposed to be (a highly volatile and flammable floor sealer) and it performed exactly as it ought to have in the circumstances (explode when exposed to an open flame). Theoretically, an argument could have been made that the product ought not to catch fire when exposed to an open flame or that it ought not to evaporate so readily. That is, one could argue that the product was poorly designed. However, the plaintiff wisely chose to base his main argument on the lack of safety information relating to dangers inherent in the product's normal use. The manufacturer gave general warnings about the product's flammability and volatility, but did not warn against leaving a furnace pilot light on when applying the sealer in a basement. Thus, the manufacturer was criticized not for supplying a product that evaporated and caught fire when exposed to open flames, but for not supplying the information required to enable consumers to deal with these propensities safely. As in *Nicholson*, the defect alleged in *Lambert* (and found to exist by the court) was present not only in the plaintiff's unit, but in every can of sealer similarly manufactured by the defendant. Further, as in the former case, the product fell short of what it ought to have been (a highly flammable and volatile product with detailed warnings), rather than of what it was supposed to be.

With these examples in mind, I now review some general definitions of the three recognized types of defects and attempt to underscore the fundamental characteristics of each. Prosser and Keeton offer one of the most concise and accurate definitions of a manufacturing defect in their famous treatise on the law of torts: "an

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<sup>73</sup> *Supra* note 2.

abnormality or a condition that was *unintended*, and makes the product *more dangerous* than it would have been *as intended*.”<sup>74</sup> In other words, a manufacturing defect is a dangerous departure from a product’s intended design—a departure from the manufacturer’s own specifications for the product that makes it dangerous to a consumer’s person or property.<sup>75</sup> A product that contains a manufacturing defect is not, in some sense, the manufacturer’s own product. Because of the defect, the product has become different from what it was supposed to be and is now unexpectedly dangerous. A manufacturing defect therefore exists when both of the following are present: (1) a difference between the unit at issue (the product that caused damage to the plaintiff) and similar products manufactured by the defendant; and (2) an evaluation that this difference renders this unit dangerous to a consumer’s person or property.

A manufacturing defect may manifest itself in various ways. For instance, the defect may be the absence of a required component part, the presence of some foreign element, or the lower than intended quality of some important feature in the unit. Moreover, there may be various reasons why the manufacturing defect occurred. For example, the defect may be due to the actions or omissions of an individual employee failing to perform his or her duties, or to the inadequacy of the systems of construction, inspection, and testing used by the manufacturer. In all cases involving manufacturing defects, however, the plaintiff’s argument appears to run along the following lines: at some point between the design of the product and its supply to the market (*i.e.*, during the construction or marketing processes), something occurred which resulted in the defendant supplying a product that fell dangerously below its intended standards. As noted by Twerski and Henderson, manufacturing defects typically occur in only a small percentage of units in a product line.<sup>76</sup> Stated somewhat differently, the majority of products of any given line supplied by a manufacturer correspond to

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<sup>74</sup> W.P. Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 5th ed. (St. Paul, Minn.: West, 1984) at 695 [emphasis added]. See also Keeton, *supra* note 69 at 585-86.

<sup>75</sup> See also Henderson & Twerski, *supra* note 62 at 1515 (“manufacturing defects are dangerous departures from a product’s intended design”); P.E. Herzog, “Recent Developments in Products Liability in the United States” (1990) 38 Am. J. Comp. L. 539 at 541 (“the product is not what it was intended to be”); W.F. Zenner, “The Interrelationship Between Design Defects and Warnings in Products Liability” (1989) 11 George Mason U.L. Rev. 171 at 175 (“a particular unit can have a manufacturing or construction defect if it differs from what the manufacturer intended to produce”); and R.A. Epstein, *Modern Products Liability Law* (Westport, Conn.: Greenwood Press, 1980) at 69 (“the product is dangerous because it does not conform to the design”).

<sup>76</sup> *Supra* note 62 at 1515.

their specifications; it is the exceptional unit which departs dangerously from its intended design.

There are two critical points here. First, the task of determining whether or not a particular product contains a manufacturing defect is relatively straightforward. With respect to the “difference” element, all that is required is a comparison between the unit that caused damage to the plaintiff (*e.g.*, Ms Donoghue’s bottle of ginger beer) and other products manufactured according to specifications (*e.g.*, bottles of ginger beer manufactured by Stevenson). If the product at issue is different from others of its kind (*e.g.*, it contains a snail), the only remaining question is whether or not this unexpected deviation from intended specifications is an improvement (the unit is now safer than its counterparts) or a defect (the unit is now more dangerous). Since damage is another requirement for the tort of negligence, the plaintiff bringing the action will allegedly have suffered some form of harm as a result of the manufacturing defect. The question will thus be whether this damage, presuming it is recognized by law, is sufficiently attributable to the deviation from the manufacturer’s specifications (a question akin to causation) and sufficiently important (a question akin to damages) as to find the product dangerous.

Second, the question of manufacturing defect is completely independent from any question related to the reasonable care exercised by the manufacturer in supplying its product. In order to determine whether the unit at issue is dangerously different from others of its kind, it is not necessary to address the manufacturer’s negligence. The manufacturer’s knowledge or foreseeability of the deviation (regardless of when these are determined<sup>77</sup> and whether they are presumed<sup>78</sup>), the probability of this deviation occurring, the costs of preventing it from occurring, the course of conduct adopted by other manufacturers similarly situated, and so on, are all irrelevant considerations to the issue of whether or not the unit that caused damage to the plaintiff is dangerously different from other products manufactured by the defendant according to specifications. I am not suggesting that these considerations are intrinsically irrelevant to the manufacturer’s liability (the question addressed under Part IV, below), but they clearly add nothing to the task of finding a manufacturing defect. Stated somewhat

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<sup>77</sup> See G. Calabresi & A.K. Klevorick, “Four Tests for Liability in Torts” (1985) 14 J. Leg. Stud. 585, on the links between knowledge, time of knowledge, and various standards of liability.

<sup>78</sup> See W. Wertheimer, “Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back” (1992) 60 Cin. L. Rev. 1183, on the relationship between negligence, strict liability, and presuming knowledge of danger.

differently, asking “does product X contain a manufacturing defect?” is not the same as asking “why does product X contain a manufacturing defect?” At this time, Canadian tort law requires that both questions be asked successively. Indeed, in theory, a manufacturer will not be liable simply for supplying a product containing a manufacturing defect; lack of reasonable care in relation to this defect must also be proven. This, however, is an independent issue from whether the product itself is defective. To determine this latter issue, one need not look into the reasons for the alleged defect (*e.g.*, the negligence of an employee or the inadequacy of the inspection and testing measures); rather, it is sufficient to consider the result at hand (*e.g.*, the snail in the bottle). Thus, with respect to manufacturing defects, there is a very clear line between the “defect” element of the tort and the “negligence” element, both of which are currently required in theory. As is often said, the former focuses exclusively on the product whereas the latter also focuses on the manufacturer’s conduct.<sup>79</sup> After discussing design defects and failure to warn, I will explain why I believe liability for manufacturing defects ought to turn on outcomes rather than reasons.

The other two categories of defects are not the primary focus of this article, but they share an important characteristic which distinguishes them from manufacturing defects. Indeed, with respect to both design defects and failure to warn, there is no clear line separating the issue of “defect” on the one hand, from the issue of “negligence.” That is, concepts relating to the reasonable care exercised by the manufacturer form an intrinsic part of the determination as to whether the product at issue is defective for any of these two alternative grounds. A conclusion that a particular design is defective implies, at least to some extent, a criticism of the care exercised by the manufacturer in the supply of its product. Likewise, a conclusion that a manufacturer failed to warn consumers of a non-obvious danger related to its product’s use suggests that the manufacturer thereby acted negligently. In my view, the reason for this distinction may be found in the focus of each theory: whereas the inquiry in a manufacturing defect case focuses on a result (the condition of the plaintiff’s unit) and compares it to what the product was supposed to be, the inquiries in design defect and failure-to-warn cases focus on a choice (the design adopted/the warnings given) and asks whether this

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<sup>79</sup> Many courts in the United States use the product (defect)/conduct (negligence) dichotomy to distinguish strict products liability from liability based in fault. The former standard is said to focus exclusively on the condition of the product supplied by the defendant; that is, it asks only whether the product is dangerously defective. See, for example, *Barkerv. Lull Engineering Co*, 20 573 P.2d 443 at 447 (Cal. 1978); *Jackson v. Coast Paint and Lacquer Co*, 499 F.2d 809 at 812 (9th Cir. 1974); and *Anderson*, *supra* note 63.

choice ought to have been different. In the former inquiry, the argument with respect to defect may proceed entirely without reference to the usual concepts of the law of negligence. Indeed, these concepts are currently tacked on once the preliminary inquiry as to defect is over. In the latter inquiry, however, concepts such as cost-benefit weighing and foreseeability of risk are central to the very question of defect.

A design defect occurs when the product is manufactured in conformity with its intended specifications, but the specifications themselves create unreasonable risks for consumers. Design defects originate in the initial stage of a product's development, where the product is conceived, sketched, and planned. It is during this phase that a manufacturer decides, for example, what the purpose of the product is, in what conditions it ought to be used, what types of materials will be used in its construction, what features and safety devices will be incorporated into it, and what type of equipment will be used to create the final product. A design defect crystallizes prior to the manufacturing process, when a choice is consciously made to construct a product according to certain specifications and it is discovered that a reasonable variation from these specifications would have created a less dangerous product. As often noted, when a design defect is alleged, the stakes for the manufacturer are quite high. When the design of the product allegedly causing damage to the plaintiff is found to be defective, the whole line of products manufactured according to the same specifications are, by necessary implication, also defective.<sup>80</sup> Stated somewhat bluntly, a manufacturer exposes itself to much greater liability by supplying a line of products made according to a faulty design, than by supplying the odd product that falls short of a design which is itself beyond reproach.<sup>81</sup>

The hallmark distinction between manufacturing and design defects is, in my view, the following: an inquiry into the existence of a design defect requires a second-guessing of a consciously made choice whereas an inquiry into the existence of a manufacturing defect requires only a comparison between the injury-causing unit and other products of its kind. Since a choice rather than an outcome is the issue, assessing whether a particular design is defective is much more intricate than determining whether a manufacturing defect is present. In the latter case, an objective and readily applicable standard is available: the product's condition is judged according to the manufacturer's own

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<sup>80</sup> Whether these other products give rise to liability in tort depends, of course, on whether they have also caused damage recognized by law as giving rise to compensation.

<sup>81</sup> See, for example, Epstein, *supra* note 75 at 69.

specifications. In the former case, however, that standard itself must be scrutinized. The question then becomes how a court can determine whether the choice made by the manufacturer poses unreasonable dangers to consumers.

Courts in Canada and in the United States have resorted to various methods and have taken into account numerous considerations on this issue. The main approaches in the United States are labelled “consumer-expectation” and “risk-utility.”<sup>82</sup> According to the former, a design is found to be dangerously defective “if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product’s characteristics.”<sup>83</sup> According to the latter, the approach used by a clear majority of jurisdictions and arguably by courts in Ontario,<sup>84</sup> a product is defectively designed when “the magnitude of the danger outweighs the utility of the product.”<sup>85</sup> Describing these methods in greater detail is beyond the scope of this article. Suffice it to say that, despite any theoretical distinctions relating to the focus of their respective analyses, the two methods share the following characteristic: they require weighing, on the one hand, the costs associated with preventing the type of accident which occurred (*i.e.*, the costs of choosing different—and safer—specifications than the ones challenged) and, on the other hand, the benefits that would result from making such a choice. Obviously, the greater the gap between these two variables, the easier it is to decide whether a particular design is defective.

Considerations discussed in case law and doctrine that are relevant with respect to the “costs associated with prevention” component include the following: (1) the utility of the product, as currently designed, to the public and to the individual plaintiff (*i.e.*, what society would be giving up if the product were found defective); (2) the nature of the product; (3) the availability of an alternative and safer design to the one being challenged; (4) whether such an alternative design is grounded in statutory requirements, common practice, or

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<sup>82</sup> See Keeton, *supra* note 69 at 588; and Henderson & Twerski, *supra* note 62 at 1532-34.

<sup>83</sup> See Keeton *et al.*, *supra* note 74 at 698.

<sup>84</sup> See, for example, *Nicholson*, *supra* note 2; *Gallant v. Beitz* (1983), 42 O.R. (2d) 86 (H.C.); *Rentway Canada Ltd. v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150 (Ont. H.C.), *aff'd* [1994] O.J. No. 50 (QL); and *Stevens (Guardian of) v. Forney*, [1993] O.J. No. 759 (QL). See also *Baker v. Suzuki Motor Co.* (1993), 17 C.C.L.T. (2d) 241 (Alta Q.B.); and *McEvoy v. Ford Motor Co.*, (1989) 45 B.C.L.R. (2d) 363 (S.C.)

<sup>85</sup> Keeton *et al.*, *supra* note 74 at 699.

theory; (5) the costs associated with knowing about this alternative design at the time the product was supplied (*i.e.*, was the information known, knowable, or not discoverable according to existing state of the art); and (6) the costs associated with implementing this alternative design in the future, including not only the costs borne directly by the manufacturer but also those which affect society in general (*i.e.*, the general costs of finding the design defective).<sup>86</sup> As for considerations that address the “benefits” of not choosing the challenged design, these same sources speak of at least the following: (7) the utility of the product, if designed according to alternative specifications, to the public and to the individual plaintiff (*i.e.*, what society would be receiving); (8) the nature and degree of danger associated with the product’s current design; (9) the probability that said danger will re-materialize in the future if no changes are imposed; (10) the degree to which an alternative design decreases the danger; and (11) the manufacturer’s ability to spread the costs associated with improving the safety of its design.

It is evident that no easy solution exists for determining when a particular design is dangerously defective. Case law and doctrine make do with alternate approaches and numerous factors, but they provide little guidance as to how these principles ought to be applied in any given case. The inquiry is clearly more involved (and arguably more subjective) than the one required for manufacturing defects, where the injury-causing product is simply compared to others made according to specifications. When the specifications themselves are said to be defective, a court must turn to some external measure in order to judge the condition of the manufacturer’s product; that is, the trier must “leave” the manufacturer’s plant, so to speak, and find some external way of assessing whether the right choice was made. Currently, the criterion chosen is deeply embedded in the law of negligence, even in those jurisdictions which adhere to a theory of strict products liability. As evident from the factors noted above, judging a product’s design requires consideration of all relevant circumstances surrounding the conception, marketing, manufacture, and supply of the product in question. In particular, it is highly pertinent to determine what the defendant’s competitors are doing in similar circumstances and what knowledge the manufacturer had, or should have had, of safer

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<sup>86</sup> *Ibid.* at 698-702; C.M. Moylan, “In Pursuit of the Appropriate Standard of Liability for Defective Product Designs” (1990) 42 Me. L. Rev. 453; B. Lemer, “Strict Products Liability: The Problem of Improperly Designed Products” (1982) 20 Osgoode Hall L.J. 250 and the cases discussed therein, in particular, *Voss v. Black & Decker Mfg. Co.* 450 N.E.2d 204 (N.Y. 1983).

alternative designs at the time of supply.<sup>87</sup> Regardless of the standard of liability adopted, the question with respect to defect is fundamentally one of balance: is this product, as currently designed, worth the cost it imposes on society in general and on any given user? A product's design is labelled defective when the utility is not worth the risk or, stated somewhat differently, when the costs of preventing a similar accident are outweighed by the benefits of such an expenditure. Accordingly, determining whether a design defect exists is intrinsically akin to determining whether the defendant acted negligently in the circumstances—"the underlying negligence calculus is inescapable."<sup>88</sup> Both elements may be satisfied by one inquiry. This result is inevitable regardless of the standard of liability adopted; the ultimate question remains whether in the circumstances, the manufacturer's choice ought to have been different.

Much of the same can be said about the law of failure to warn. According to this theory, a manufacturer is subject to liability for providing inadequate warnings "about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells."<sup>89</sup> In essence, this theory of products liability is but an instance of the defective design theory since, in both cases, the plaintiff generally argues that the specifications adopted by the manufacturer themselves create unreasonable dangers to consumers and their property. That is, in order to establish the prerequisite product defect, the theory again centres on choices made by the defendant in the conception, planning, sketching, and marketing of a line of products of which the plaintiff's unit is representative, and asks whether these choices ought to have been different in the circumstances—whether the manufacturer made a

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<sup>87</sup> Some have suggested that the only difference between negligence and strict liability is whether knowledge of the risk (*i.e.*, foreseeability) needs to be proven (negligence) or is conclusively presumed (strict liability). See, for example, Wertheimer, *supra* note 78; and J.F. Vargo, "Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?" (1993) 10 Touro L. Rev. 21 at 24-25: "What distinguishes strict liability from negligence? It is very simple. One must impute the knowledge of the relevant danger or defect at the time of trial to the manufacturer. That is it." However, in my view, there is much more to a finding of negligence than a finding that the risk was known or foreseen. Foreseeability is but a threshold. A finding of negligence requires, in addition, a balancing of numerous factors including the gravity of the danger involved, the probability of its occurrence—which is different from foreseeability: *Bolton v. Stone*, [1951] A.C. 850 (H.L.)—and the costs associated with remedial measures.

<sup>88</sup> See *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 at 183-84 (Mich. 1984), on the standard of liability in a design defect case. For similar observations, see *Balido v. Improved Machinery Inc.*, 105 Cal. Rptr. 890 at 895 (Ct. App. 1972); and *Fibreboard Corp.*, *supra* note 63 at 1174.

<sup>89</sup> *Keeton et al.*, *supra* note 74 at 685.

justifiable choice in not giving the type of warning now requested by the plaintiff. In establishing defect, failure to warn thus addresses the same question as any other tort action based on negligence in which the reasonableness of the defendant's conduct is at issue. In this respect, the observations made in the preceding paragraphs about the difficulty of completely disregarding fault when faced with an alleged design defect apply here with equal force.

To be sure, there are differences between these two categories of products liability. Failure to warn is obviously limited to challenging those specifications which relate to the safety information provided (or not) by manufacturers. More significantly, unlike both categories of defect reviewed above, failure to warn is a residual theory of liability: it addresses only the correlation between a hazard associated with the defendant's product and the information conveyed to the plaintiff. The argument is not that the hazard is unreasonable *per se* (the essence of design defect and manufacturing defect arguments), but that ignorance of it creates an excessive risk. Failure to warn presupposes that the danger associated with the product's use (that of which a warning is demanded) is, alone, insufficient to base liability, but asserts a residual right to disclosure of that which happened. This distinguishing feature makes failure to warn the most flexible yet problematic theory of manufacturer liability. It is flexible because it may be invoked as a supplement to one of the two theories discussed earlier,<sup>90</sup> or to impeach a product otherwise beyond reproach in its design and manufacture.<sup>91</sup> Indeed, its premise appears to be as follows: if two identical products are compared, one including a complete description of the product's non-obvious dangers and the other omitting such information, the latter's

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<sup>90</sup> See, for example, *Rivtow Marine Ltd. v. Washington Iron Works* [1974] S.C.R. 1189 [hereinafter *Rivtow Marin*] (failure to warn of design defect in mounting of crane); *Nicholson, supra* note 2 (failure to warn of design defect in location of lawnmower gas reservoir); *Setrakov Construction Ltd. v. Winder's Storage & Distributors Ltd.* (1981), 128 D.L.R. (3d) 301 (Sask. C.A.) (failure to warn of design defect in trailer's suspension); *McCain Foods Ltd. v. Grand Falls Industries Ltd.* (1991), 116 N.B.R. (2d) 23 (C.A.) [hereinafter *McCain Foods*] (failure to warn of manufacturing defect in mounting of crane); and *Can-Arc Helicopters Ltd. v. Textron Inc.* (1991), 86 D.L.R. (4th) 404 (B.C.S.C.) (failure to warn of manufacturing defect in helicopter gear).

<sup>91</sup> See, for example, *Lambert, supra* note 2 (failure to warn about danger of leaving pilot lights on when applying a flammable floor-sealer); *Meilleur v. U.N.I.-Crete Can. Ltd.* (1985), 15 C.L.R. 191 (Ont. H.C.) (failure to warn about danger of blindness when using a liquid concrete additive without protective eye wear); *Smithson v. Saskem Chemicals Ltd.* (1985), [1986] 1 W.W.R. 145 (Sask. Q.B.) (failure to warn about danger of blindness when mixing different chemical drain cleaners); *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1986), 54 O.R. (2d) 92 (C.A.) [hereinafter *Buchan*] (failure to warn about danger of stroke associated with use of oral contraceptives); and *Pirie v. MSD Auguet* (1989), 96 N.B.R. (2d) 337 (Q.B.) (failure to warn about danger of bacterial soft rot in potatoes, associated with use of herbicide).

silence renders it more dangerous to consumers and their property than the former. This argument holds regardless of the nature of the undisclosed hazard, that is, whether the risk is created by some (other) defect in the design or manufacture of the product at issue<sup>92</sup> or by some danger inherent to the use of an otherwise properly designed and made product.<sup>93</sup> However, this characteristic also makes failure to warn an easy target for abuse. All products create risks to users and their property. Because a successive failure-to-warn argument does not require a finding that the risk at issue is unreasonable *per se*, only a finding that the manufacturer's silence is unreasonable, the scope of this theory of liability is considerably broad. When one considers the range of risks associated with the use of any given product, the elasticity of the concept of disclosure, the very low costs of the remedial measures requested, and the fact that an entire product line is usually under scrutiny, one can appreciate the fears expressed by some commentators that failure to warn carries the potential of making manufacturers insurers for their products.<sup>94</sup> Indeed, a residual argument can almost always be made that what happened to the plaintiff, that is, the loss suffered when a risk of using the defendant's product materialized, was inadequately disclosed by the manufacturer, thereby rendering its product defective. One final distinguishing feature of failure to warn is that while a design defect, by definition, crystallizes prior to the manufacturing process and thus before the product's supply in the market, the former defect may also arise after both of these phases. A manufacturer's duty to supply adequate information to its consumers is continuous and is not necessarily expended following supply.<sup>95</sup> For example, a manufacturer may be liable for not warning known consumers of unreasonable dangers associated with the product's use

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<sup>92</sup> As in *Rivtow Marine* and the other cases cited *supra* note 90.

<sup>93</sup> As in *Lambert*, *supra* note 2; and the other cases cited *supra* note 91.

<sup>94</sup> See generally M.S. Jacobs, "Toward a Process-Based Approach To Failure-to-Warn Law" (1992) 71 N.C. L. Rev. 121; American Law Institute, *Reporter's Study: Enterprise Responsibility for Personal Injury* (1991), c. 7; and J.A. Henderson & A.D. Twerski, "Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn" (1990) 65 N.Y.U. L. Rev. 265. See also P.W. Huber, *Liability: The Legal Revolution and its Consequences* (New York: Basic Books, 1988) at 51-58; G.L. Priest, "Products Liability Law and the Accident Rate" in R.E. Litan & C. Winston, eds., *Liability: Perspectives and Policy* (Washington, D.C.: Brookings Institution, 1988) at 217-20; A. Schwartz, "Proposals for Products Liability Reform: A Theoretical Synthesis" (1988) 97 Yale L.J. 353 at 398; and Epstein, *supra* note 75 at 93.

<sup>95</sup> See, for example, *Products Liability*, *supra* note 3 at 44-45.

discovered after the product's supply, including any known design or manufacturing defect.<sup>96</sup>

These qualifications aside, pure strict liability is also incompatible with a workable failure-to-warn theory. The main reason is that, in order to determine whether the product at issue is defective (a precondition to liability regardless of the standard applied), the inquiry cannot focus exclusively on the product (an outcome), but must also address the reasons explaining the product's current condition (a choice). The name itself indicates that this theory of liability is concerned with the latter; after all, a manufacturer is liable for failing to warn a consumer of a risk associated with its product, not merely because a consumer was unaware of that risk. Under pure strict liability, the issues would be limited to whether the plaintiff was injured or suffered property damage as a result of the defendant's product and, if so, whether the plaintiff was fully aware of the risk when using the product. The focus would be exclusively on the defendant's product and the plaintiff's awareness of the risks: does the product provide consumers with adequate warnings of the hazards associated with its use? Implementing such a standard would be extremely difficult, however, precisely because of this theory's residual nature. This standard provides no guidelines whatsoever for severing frivolous claims from those with merit, nor does it provide manufacturers with any discernible limits to their liability. For every risk associated with every use of a given product there is a potential argument that the product conveyed inadequate warnings to consumers. This potential is all the greater considering the adaptable nature of disclosure; a warning's broad range of explicitness compounds the broad range of hazards. Pure strict liability in this field could indeed convert manufacturers into insurers. As noted recently by the Supreme Court of California, one of the founders of strict products liability, "[s]trict liability, however, was never intended to make the manufacturer or distributor of a product its insurer."<sup>97</sup>

Moreover, focusing exclusively on the product's condition would not be consistent with the policy goals usually associated with safety labels. The reasons for imposing a duty to warn on manufacturers concern accident prevention and personal autonomy.<sup>98</sup> As suggested

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<sup>96</sup> See, for example, *Rivtow Marine* and the other cases cited *supra* note 90.

<sup>97</sup> *Anderson*, *supra* note 63.

<sup>98</sup> See Henderson & Twerski, *supra* note 94 at 285-86; and M.A. Pittenger, "Reformulating the Strict Liability Failure to Warn" (1992) 49 Wash. & Lee L. Rev. 1509.

above, a product that provides warnings of inherent dangers, warnings of any known defect, directions for safe use, and guidelines to deal with emergency situations, is presumptively safer than a counterpart with a blank label. Such information enables consumers personally to manage the risks they are bound to encounter and, provided the information is accessed, read, understood, and acted on, warnings can play an important part in tort law's goal of reducing the social costs of accidents.<sup>99</sup> Warnings also enable consumers to make informed choices in the marketplace by offering them means to decide, for instance, whether or not to buy product X, whether to buy it from manufacturer A or from manufacturer B, and how to use it in order to minimize any possible risk. Consumers, not unlike patients,<sup>100</sup> have a right to personal autonomy and integrity in decision making. Adequate disclosure of hazards to person and property promotes this right, enabling consumers to decide whether, and in what measure, they will use products manufactured with them in mind. Again, pursuit of this objective is contingent on the information being accessible, read, and understood. A standard of liability for failure to warn focusing exclusively on the condition of the product, however, could interfere with both of these goals by making manufacturers concerned more with the quantity and specificity of their warnings than with the quality and accessibility of the information conveyed to consumers.

In order to be fair, workable, and functional, the standard of liability for failure to warn must consider the reasons explaining the product's current condition: why is the warning requested by the plaintiff not included on the defendant's product? In fact, case law in negligence and strict liability jurisdictions confirms that, regardless of the language chosen, courts do not focus exclusively on the product when addressing the defect issue.<sup>101</sup> They have required some unsatisfactory explanation before finding that a product's warning is defective or, more accurately, before finding that a defendant failed to adequately warn the plaintiff. Most significantly, courts in Canada and the United States initially inquire whether the manufacturer owed a duty to warn the plaintiff of the risk which materialized, a question remotely similar to the duty of care issue addressed or assumed in all other negligence actions. In answering this question, they focus primarily on the manufacturer's

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<sup>99</sup> On the relevance of this goal, see G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, Conn.: Yale University Press, 1970) at 24-33.

<sup>100</sup> On the influence of personal autonomy in shaping a doctor's duty of disclosure, see *Reibl v. Hughes* [1980] 2 S.C.R. 880; and *Ciarlariellov. Schacter*, [1993] 2 S.C.R. 119.

<sup>101</sup> See, for example, Boivin, *supra* note 67; and the articles cited *supra* note 64.

foreseeability of the risk of personal injury or property damage to the plaintiff or, as it is sometimes put, its actual or constructive knowledge of the hazard. This notion of foreseeability is intrinsic to the very concept of negligence: a foreseeable risk is one which should influence the choices made in the marketing of a product.

In summary, although a court can focus exclusively on an outcome (the defendant's product) and ignore the reasons given for this result (the defendant's conduct) in determining whether a manufacturing defect is present, negligence concepts such as cost-benefit balancing and foreseeability of risk are inseparable from inquiries into the defectiveness of a design or of a warning. Unlike manufacturing defects, a separate question as to whether the manufacturer was negligent in relation to the defect is unnecessary in such cases. By concluding that the product supplied by the defendant contains a faulty design, or that the defendant failed to warn consumers as to non-obvious dangers inherent in the product's use, a court is simultaneously concluding that the manufacturer somehow failed to exercise reasonable care in the circumstances; that is, the manufacturer ought to have made a different choice. Accordingly, I believe the question of whether to adopt "strict liability" with respect to design defects and failure to warn is fundamentally a red herring. As the experience in the United States of the past thirty years shows, issues such as a balancing of costs and benefits and foreseeability of risk will be part of the inquiry into liability, whatever standard is officially adopted. There, product and conduct are intrinsically linked. In closing, I am not suggesting that a pure negligence standard is currently used in Canada or in the United States with respect to design defect and failure to warn. Indeed, some elements of strict liability coexist in these areas, even in Canada where a standard of fault is adhered to in theory.<sup>102</sup> I am suggesting, however, that a workable pure strict liability standard cannot properly be implemented without fundamental changes being made to the underlying theories of design defect and failure to warn.

#### IV. LIABILITY FOR INJURIOUS MANUFACTURING OUTCOMES

Negligence concepts are irrelevant when determining whether the unit causing damage to the plaintiff contains a manufacturing defect, but are they also irrelevant in fixing the manufacturer's liability for the

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<sup>102</sup> See, for example, Boivin, *supra* note 67.

defect? The official answer is clear: even when a manufacturing defect is at issue, Canadian courts continue to insist on basing liability on some finding of negligence. Fridman describes the state of the law as follows:

“[L]iability can only arise if there was negligence of some kind on the part of the party responsible for putting the thing into circulation and causing its defect or ultimate transference to the one subsequently injured. Without proof of some act or omission that amounts to negligence, there can be no liability.”<sup>103</sup>

In other words, even though a plaintiff proves that he or she suffered recognized damages as a result of a product which is dangerously different from its intended design, the plaintiff must also prove lack of reasonable care on the part of the manufacturer in relation to this defect before recovering. Liability in tort is thus currently predicated on unreasonable choices rather than injurious outcomes. Our courts not only ask whether a manufacturing defect occurred; if it did, they also ask why and demand from the plaintiff (at least in theory) some explanation compatible with lack of reasonable care on the part of the defendant. In this part, I argue that the basis of liability in this area ought to be the dangerously defective product supplied by the manufacturer, rather than the reasons behind this result.

It should be noted at the outset that under Canadian tort law liability may, in some circumstances, depend exclusively on whether the defendant caused a particular injurious outcome to materialize. This principle is at the core of the rule in *Rylands v. Fletcher*,<sup>104</sup> the law pertaining to dangerous animals, the law of defamation, and the law of nuisance. In each of these areas, liability may be predicated solely on a result, that is, an injury to the plaintiff's person or property by either a “non-natural use” of the defendant's land, a dangerous animal under the defendant's control, false and defamatory information published by the defendant, or an unreasonable interference with the enjoyment of the plaintiff's property. Lack of reasonable care by the defendant in relation to this result is not required to establish his or her liability, and due diligence in preventing the outcome offers no absolute bar to recovery.<sup>105</sup> In these areas, tort law is concerned more with results than with reasons or explanations. The question posed is not whether the

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<sup>103</sup> G.H.L. Fridman, *The Law of Torts in Canada* vol. 2 (Toronto: Carswell, 1989) at 5.

<sup>104</sup> (1866), [1865-67] L.R. 1 Ex. 265, *aff'd* (1868), L.R. 3 H.L. 330 [hereinafter *Rylands*].

<sup>105</sup> See, for example, Fleming, *supra* note 22 at 335 (*Rylands*), 337 (dangerous animals), 539 (defamation), and 424-25 (nuisance). The Supreme Court of Canada recently confirmed that lack of negligence is not a bar to nuisance: *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181.

defendant ought to have made a different choice in the circumstances, but whether his or her actions or omissions caused the injurious outcome. Of course, a finding in favour of the plaintiff implies that he or she was wronged by the defendant as well as some form of disapproval of the defendant's behaviour. However, the crux of this wrong is not the choice made by the defendant, but the consequence suffered by the plaintiff. Even if the defendant took all reasonable care in the circumstances to avoid any damage to the plaintiff, the way in which he or she dealt with property, animals, or publications has nonetheless had this consequence. Unless any recognized defence is available, the defendant will have to answer for this outcome. Accordingly, with respect to manufacturing defects, the issue is not whether to recognize some novel form of tort liability predicated solely on results, irrespective of choices. The question is whether the injurious outcome defined earlier, namely, personal injury or property damage caused by a product dangerously departing from its intended specifications, should receive a similar treatment by our common law. I believe it should.

As noted in the introduction, strict products liability has had authoritative proponents in Canada since the 1960s, the principal ones being Linden J., Waddams, and the Ontario Law Reform Commission.<sup>106</sup> For example, Linden's arguments for the open recognition of strict tort liability include the similarity of products and consumption habits in Canada and the United States, the frequency of American ownership of manufacturing plants located in Canada, the high level of trade between the countries, as well as the familiar arguments outlined earlier for enterprise liability made by Traynor J. in *Escola* and *Greenman*.<sup>107</sup> In one of his articles, Linden added that "[t]he adoption of the strict tort liability doctrine would also be evidence that the maturity of Canadian tort law matches that of our manufacturing industry."<sup>108</sup> However, Canadian courts and legislatures have generally not responded to calls for reform. Before making a further recommendation, it is relevant to discuss their respective reasons for not openly adopting strict products liability. Is there any basis for the apparent legislative and judicial apathy in this field? In retrospect, their response may be justifiable in view of developments in the United States following this standard's adoption in particular, its dilution in some instances *via* the concept of defect. Nevertheless, I argue below that the

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<sup>106</sup> *Supra* notes 3-6 and accompanying text.

<sup>107</sup> *Supra* notes 48-55 and accompanying text.

<sup>108</sup> "Products Liability," *supra* note 4 at 249.

time has come for judicial intervention, at least in circumstances where a norm of pure strict liability is workable. In my opinion, the next phase in the development of Canadian common law ought to witness an open adoption of a tailored alternative basis of liability, that is, strict liability for injurious manufacturing outcomes.

One can only speculate on the reasons for the legislative apathy in this area. Canadian legislatures have traditionally avoided private law substantive issues, such as the standard of liability used in judging a defendant's conduct, unless there is some pressing reason to intervene. Legislative reform is possible, as demonstrated in all common law provinces by the replacement of contributory negligence with comparative negligence, and the recognition of contribution amongst joint tortfeasors.<sup>109</sup> However, I suspect that tort reform with respect to products liability is perceived as being first and foremost within the realm of the judiciary. The point, of course, is not that legislatures lack jurisdiction to intervene, but rather that they perceive an alternative venue for reform. The common law is flexible and capable of accommodating minor departures from the *status quo*<sup>110</sup> without requiring the lengthy and expensive legislative process. The judiciary can intervene in a more specific manner than can the legislature, limiting its comments to the circumstances at bar and waiting to decide if different facts should produce the same result. This view is reinforced by recent judgments of the Supreme Court of Canada sanctioning, in appropriate circumstances, court-made incremental changes to the common law to ensure that it reflects the emerging needs and values of Canadian society.<sup>111</sup> Perhaps legislatures perceive the debate on the appropriate basis of liability for defective products as being, by nature, one for the country's appellate courts to resolve. The latest phase in the development of strict products liability in the United States, characterized by the recall of negligence elements in specified circumstances, would apparently justify such a perception. After all, why should a Canadian legislature enact general strict liability, as recommended by its proponents, only to have courts in that jurisdiction struggle to find a meaningful distinction between strict liability and negligence and, in the long run, resort to approaches effectively identical to the ones currently used? If the courts perceive the need for change in

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<sup>109</sup> See Fridman, *supra* note 103, vol. 1 at 369-72.

<sup>110</sup> *Fleming v. Atkinson* [1959] S.C.R. 513 at 535.

<sup>111</sup> See *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Salituro v. R.* [1991] 3 S.C.R. 654; and *London Drugs*, *supra* note 16.

a specific area, they can proceed incrementally on a case-by-case basis. For example, they can openly recognize that proof of negligence is unnecessary for manufacturing defects, since a combination of *res ipsa loquitur* and other evidential devices is currently used to achieve similar ends.

Related to this concern is perhaps the view that there is no real need to interfere with the current law.<sup>112</sup> As noted in Part II, because of evidential shortcuts and warranty claims there is much strict liability already in the law. The Ontario Law Reform Commission based its recommendations for strict products liability not on the existence of wrongly uncompensated injured persons, but primarily on anomalies and irrationalities within the current law.<sup>113</sup> The Commission appeared to say it wanted the legislature to tidy up a messy area of law. Considering the intense competition for legislative attention, on the one hand, and the time, money, and energy required to see a bill through the entire process, on the other, it is no wonder that reform of this sort is low on most legislatures' scale of priorities. Similarly, the perception may also be that people injured by defective products are adequately compensated for their injuries by the current tort system (since much strict liability is already in the law) and by our relatively generous welfare system. It is no secret that the absence of comprehensive health insurance in the United States compels many injured persons there to turn to tort law for compensation.<sup>114</sup> There, deficiencies in the tort system are magnified as the denial of a claim often means the denial of recovery altogether. When comprehensive collateral compensation exists, however, anomalies and irrationalities in tort law are clearly easier to tolerate and excuse, and they are less often in the spotlight. After all, if the plaintiff's claim is denied, he or she will at least be adequately covered for medical costs in Canada. Further, with respect to other arguments in favour of strict liability, there is no evidence to my knowledge of American corporations dumping unsafe products in Canada so as to benefit from more favourable products-liability laws. Neither are there any allegations that some Canadian corporations are owned by American citizens who unfairly seek to avoid the costs of strict liability in their home country. Taken together, these factors may justify a conclusion that there is no compelling reason to alter, *via* legislation, the standard of

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<sup>112</sup> This is the main reason that commentators such as Thompson, McLaughlin, Shannon, and Stradiotto oppose a move towards strict products liability: see *supra* note 5.

<sup>113</sup> *Supra* note 6 at 33. Linden criticizes this aspect of the report as it presents "an overly optimistic view of the present law": see "Commentary," *supra* note 4 at 93.

<sup>114</sup> See generally *Products Liability*, *supra* note 3 at 210.

liability used by Canadian courts to judge a manufacturer's responsibility. "[R]eforming the law and putting it on a more rational basis"<sup>115</sup> is a commendable goal. Without more, however, it is not a very compelling ground for legislative intervention.

Another element that weakens the current case for legislative reform is its apparent superficiality. Regardless of the standard of liability adopted in theory, there is much similarity between the approaches used by courts in Canada and in the United States. Contrary to what many Canadian commentators imply, however, this *rapprochement* does not result only from a watering down of the negligence standard in Canada. True, Canadian courts effectively resort to pure strict liability, at least when dealing with products containing manufacturing defects. However, there is also a move towards greater involvement of negligence in the United States with respect to defective designs and warnings, despite the official adherence in most states to strict liability. Thus, I submit it is premature to recommend the open adoption in Canada of a general standard of strict liability for defective products. Recommendations for reform should, at the very least, avoid using the terms "negligence," "strict liability," and "defect" in too hasty a fashion. It is necessary to look behind these concepts to see how courts are actually treating defective products and, perhaps most importantly, to pay more than lip-service to the distinctions between the three categories of defects currently giving rise to liability in the two countries. The recommendation made by the Ontario Law Reform Commission comes short in this regard, for it suggests replacing the current rules with a principle that liability for personal injury and damage to property in this field, rests on the supply of a "defective product" which is broadly defined.

Finally, it is conceivable that Canadian legislatures are also concerned with the effects that strict products liability might have on liability insurance and on the innovative spirit of manufacturers—arguments sometimes made in favour of moving the law in the United States away from strict liability<sup>116</sup>—and that they are sensitive to the growing criticism in the United States.<sup>117</sup> The concern here is not the presence of an alternative forum or the absence of a valid reason to legislate, but the fear that the benefits of reforming the law are

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<sup>115</sup> *Report on Products Liability*, *supra* note 6 at 33.

<sup>116</sup> See, for example, Huber, *supra* note 94; R.J. Stayin, "The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers" (1988) 14 *Can.-U.S. L.J.* 193; and G.S. Frazza, "A U.S. View of the Products Liability Aspects of Innovation" (1989) 15 *Can.-U.S. L.J.* 85.

<sup>117</sup> *Supra* note 60 and accompanying text.

outweighed by the costs, that is, by the potential harm to suppliers of goods and to society in general from higher insurance costs and decreased investments in innovative products. Other costs of reform include those related directly to the legislative process. Like others, I believe these concerns are somewhat inflated.<sup>118</sup> The evidence to date on the cost of strict liability is mostly anecdotal, and the information that exists is open to various interpretations. As previously noted, much of the recent criticism of strict products liability is addressed to issues other than the standard of liability, such as the high awards granted by juries and the abuse of punitive damages.<sup>119</sup> In other words, the criticisms address issues which do not necessarily carry over when a change in the standard of liability is made.

Adopting strict liability in Canada would not legally or logically lead to, for instance, a greater reliance on jury trials in civil cases, nor would it inevitably lead to an increased use of punitive damages awards. Canadian jurisdictions may address all of these issues, or only the ones believed to be relevant to the Canadian context. The choice of strict liability does not require the choice of other aspects of products liability law that currently exist in the United States and that may appear undesirable. Indeed, in areas such as non-pecuniary damages, our courts have already shown their willingness to adopt innovative and distinctively Canadian solutions to control the costs associated with the civil liability system.<sup>120</sup> In sum, a causal connection between strict products liability *per se*, on the one hand, and higher liability insurance costs and decreased innovation, on the other, has yet to be satisfactorily demonstrated. Moreover, the legislative process costs of reforming products liability are no greater than those associated with any government bill. Having said this, it is hard to dispute the negative impact of these concerns on society's—and the legislatures'—perception of the problem. The recent backlash against strict products liability in the United States has perhaps tainted the movement for reform in

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<sup>118</sup> See, for example, *Report on Products Liability* *supra* note 6 at 71-78; *Products Liability* *supra* note 3 at 209; W.K. Viscusi & M.J. Moore, "Rationalizing the Relationship between Products Liability and Innovation" in Schuck, ed., *supra* note 60 at 105; R.E. Litan, "The Liability Explosion and the American Trade Performance: Myths and Realities" in Schuck, ed., *supra* note 60 at 127; S.P. Croley & J.D. Hanson, "What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability" (1991) 8 *Yale J. on Reg.* 1; and R.A. Prentice & M.E. Roszkowski, "'Tort Reform' and the Liability 'Revolution': Defending Strict Liability in Tort for Defective Products" (1992) 27 *Gonzaga L. Rev.* 251.

<sup>119</sup> *Supra* note 61.

<sup>120</sup> See *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229 [hereinafter *Andrews*], (placing a cap on liability for non-pecuniary loss).

Canada. At the very least, it has had a sobering effect, forcing commentators and legislators to acknowledge the existence of new variables. Plausibly, the need to address these issues has dissuaded some from pursuing reform.

Undoubtedly, there are other possible reasons why most Canadian legislatures have not reformed the law of products liability in the manner suggested by the Ontario Law Reform Commission and others. For example, this may simply be the result of a lack of political will, in view of strong corporate interests and powerful lobby groups, to introduce legislation which would have the appearance, if not the effect, of being anti-manufacturer and pro-consumer. My goal was not to be exhaustive in this respect, but to raise what I believe are the main obstacles facing legislative reform. To reiterate, these hurdles are: (1) the perception that courts are an appropriate forum to alter, if necessary, the basis of liability for torts involving defective products; (2) the perception that the case for reform is not, at this time, sufficiently compelling; and (3) the concern that any possible benefits of reforming the law would be outweighed by the social costs ensuing therefrom. As noted, the first two obstacles are not easily challengeable, particularly when attention is paid to the various theories of liability concealed by the general concept of defect and the costs associated with the legislative process. Thus, this recommendation is addressed to our common law courts.

Reform by the judiciary, however, is faced with a set of obstacles similar to those outlined above. In essence, it is necessary to overcome the perception that there is no need to reform the common law of products liability at this time. Arguably, this perception is based on the availability of an alternative venue for reform and the weakness of the case for reform, which includes the apprehension of significant social costs associated with changes of the type advocated by the Ontario Law Reform Commission and others. For reasons that follow, I believe both of these grounds may be challenged and that, at least with respect to manufacturing defects, some reform is required. At the outset, the argument that courts would interfere if only faced with an appropriate case is fundamentally flawed. Any case where there is little proof of manufacturer negligence (and there are many)<sup>121</sup> is an appropriate one for making the move from the fictions underlying *res ipsa loquitur* and similar evidential shortcuts to an open principle of strict tort liability for manufacturing defects. Moreover, counsel are frequently making

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<sup>121</sup> See, for example, *Farro*, *supra* note 17; and *LeBlanc*, *supra* note 18, discussed below, under Part V, below.

submissions on the issue of strict products liability.<sup>122</sup> If our courts are refusing to make this or any similar change, it is by choice and not because they are offered no opportunity to interfere.

The alternative-forum argument is sweeping when made by the judiciary. The legislature is not the only body for altering the basis of liability for torts involving defective products. To be sure, major reforms with uncertain ramifications should be left to legislatures.<sup>123</sup> Moreover, uniform reform is commendable and more easily accomplished by legislative bodies. The Supreme Court of Canada held, however, that courts have the power and the duty to make incremental changes to the common law when the circumstances require such a reform.<sup>124</sup> Perhaps reforms of the magnitude proposed by the Ontario Law Reform Commission are not “incremental” and should be avoided, but a move from a weak standard of negligence to open strict liability is, arguably, the type of judicial reform contemplated by the Supreme Court, at least with respect to manufacturing defects where something akin to this standard is already applied. Thus, while a legislature is, to some extent, justified in avoiding the issue since an alternative forum for reform exists and a legislature, strictly speaking, has no duty to legislate in such a matter of substantive private law, courts may be criticized for awaiting legislative intervention without more. It is one thing to say the circumstances are not appropriate for change. It is quite another to suggest that, regardless of the circumstances and the need for reform, courts have no jurisdiction to intervene. The latter suggestion is misleading since courts perceiving a need to act within the boundaries established by the Supreme Court not only have the power, but the obligation, to do so. This duty is all the greater considering the improbability of legislative reform to products liability. “The courts alone can fashion a remedy. They should do so, with the knowledge that the legislature will act if it does not approve.”<sup>125</sup>

The problem, however, is that judicial reform of products liability is not perceived as warranted. The duty discussed by the Supreme Court in cases such as *London Drugs*<sup>126</sup> is triggered only when strong reasons exist for deviating from a strict application of the rule of precedent; in

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<sup>122</sup> See, for example, *Buchan*, *supra* note 91; *McCain Foods*, *supra* note 90; and *Hollis v. Birch* (1993), 103 D.L.R. (4th) 520 (B.C.C.A.).

<sup>123</sup> See the recent trilogy, *supra* note 111.

<sup>124</sup> *Ibid.*

<sup>125</sup> “Reform by the Judiciary,” *supra* note 60 at 331-32.

<sup>126</sup> *Supra* note 16.

this case, from the rule that proof of negligence is required to sustain a manufacturer's liability in tort. The arguments against such a departure focus mainly on: (1) the relatively small number of cases before our courts involving defective products compared to the United States;<sup>127</sup> (2) the infrequency of decisions where it is lack of proof with respect to negligence which causes a dismissal of the claim;<sup>128</sup> (3) the availability of evidential devices that help with the problem of establishing negligence;<sup>129</sup> (4) the recall by American courts of negligence elements when dealing with design defects and failure to warn;<sup>130</sup> (5) the existence of a more generous welfare system in Canada compared to the United States, diminishing the number of claims brought and playing down the weaknesses of the tort system;<sup>131</sup> (6) the magnitude of the reform coupled with the uncertainty of its ramifications on commerce, insurance, and litigation;<sup>132</sup> and (7) the view that, in the end, the issue is academic and has few material implications for consumers.<sup>133</sup> I reject the social costs argument, for reasons already given, particularly since we are talking about a very specific area of products liability: an area characterized by the exceptional departure from intended specifications. The other arguments amount to the following: since very few potential plaintiffs would actually benefit from a rule of strict liability, the *status quo* should be preserved. This proposition may be valid when a legislature is proactively considering the question, but it should not carry the same weight when courts are responding to requests made in the context of litigation. In the following paragraphs, I contend that when

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<sup>127</sup> For instance, Henderson and Twerski "conservatively estimate" that no fewer than 3,000 published court opinions have cited § 402A of the *Restatement (Second) of Tort* from 1965 to 1992, making it one of the most frequently cited sections of this *Restatement* see *supra* note 62 at 1512.

<sup>128</sup> *Products Liability*, *supra* note 3 at 58; and *Report on Products Liability* *supra* note 6 at 18. But see "Commentary," *supra* note 4 at 93.

<sup>129</sup> *Supra* notes 38-47 and accompanying text.

<sup>130</sup> *Supra* notes 60-64 and accompanying text.

<sup>131</sup> *Supra* note 114 and accompanying text.

<sup>132</sup> The "insurance crisis" of the 1980s in the United States is often quoted by Canadian courts as a reason for controlling tort liability: see, for example, *Andrews* *supra* note 120; and *Snell v. Farrell*, [1990] 2 S.C.R. 311 (refusing to place on defendants an onus of disproving causation). Similarly, the perceived costs of strict products liability shed some light on the current apathy *vis-à-vis* this concept.

<sup>133</sup> Arguably, cultural, sociological, political, and institutional differences between Canada and the United States may also explain the perception that reform of the sort adopted in the United States should be avoided. See generally J.R.S. Prichard, "A Systemic Approach to Comparative Law: Effect of Cost, Fee, and Financing Rules on the Development of Substantive Law" (1988) 17 *J. Leg. Stud.* 451.

the case for reform is focused on products dangerously departing from intended specifications, stronger arguments exist in favour of developing the law of products liability along the lines discussed herein.

In my view, there are four principal arguments in favour of reform.<sup>134</sup> The first concerns the unfairness of the burden of proof currently imposed on plaintiffs. Once a manufacturing defect is shown on a balance of probabilities, is it fair to ask the plaintiff to explain in negligence terms how this defect came about? When a product's intended specifications are challenged, as when a failure to warn or design defect is claimed, the product itself usually provides enough information to address the defect/negligence issue. The warnings and designs adopted by the defendant and competitors are readily accessible to plaintiffs through the marketplace. Manufacturing defects fall in a different category. Consumers usually know little about a product's manufacturing process and, for various reasons, this information is not always accessible. However, even assuming a plaintiff knows exactly how his or her defective product is usually made (*i.e.*, what normally happens within the plant's four walls), this would be insufficient in many cases to establish the required negligence. As noted earlier, a manufacturing defect is exceptional by nature, since most products conform to their intended specifications. Proving negligence means showing that, at the time this exception surfaced, the manufacturer made some unreasonable choice contributing to the mishap. Information about a manufacturer's normal process may be helpful in speculating about what probably went wrong. For example, a defendant's poor inspection or testing process often supports the argument that regardless of how the defect arose, it ought to have been discovered prior to supply.<sup>135</sup> However, when faced with state-of-the-art procedures or hidden defects, as is often the case in this area, knowledge of the usual is of limited use in explaining the unusual. Here, in order to show an unreasonable choice, a plaintiff must in theory discover the exact point in time and space where the manufacturing process failed and produced the unintended. This type of information is unavailable to consumers. Unlike automobile accidents and most misadventures leading to tort actions, manufacturing defects crystallize in concealed environments, inaccessible to their future

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<sup>134</sup> In this section, I attempt to link the policy arguments for strict liability to the specific category of manufacturing defects. Similar arguments, of a more general tone, may be found in the works of Waddams and Linden, *supra* notes 3 and 4; and in the *Report on Products Liability* *supra* note 6. See also notes 48-55 and accompanying text; *Escola*, *supra* note 46; and "The Assault on the Citadel," *supra* note 15.

<sup>135</sup> See, for example, *MacPherson*, *supra* note 27.

victims. Indeed, the only witnesses to the manufacturing process and potential negligence are the defendant manufacturer, its employees, agents, and guests. Moreover, there usually is a lapse of time between the alleged negligence (which must occur prior to supply) and the damages suffered by the plaintiff. For example, the consumer in *Greenman*<sup>136</sup> was injured two years after purchasing the defendant's combination power tool. Of course, the greater this time differential, the more difficult it is for an outsider to explain what occurred during the manufacturing process, even assuming he or she could pierce the defendant's veil. In contrast, a rule of strict liability for manufacturing defects would be fair to plaintiffs because it would tailor the required elements to the type of information consumers might reasonably be expected to have about products. The burden of proof would be limited to a demonstration of the product's current condition and of its impact on their person or property, but would not require an explanation of this result. Under this theory, a plaintiff would have a *prima facie* cause of action upon demonstrating the following elements: (1) at the time of the accident, the unit used was dangerously different from others manufactured according to specifications (defect); (2) the defendant was responsible for the supply of this defective product (identity); and (3) the defect caused personal injury or property damage (damage and causation).

Another argument for strict liability focuses on the superficiality of the common law in this area. Canadian courts have not been insensitive to the hurdles facing consumers in accessing the information required to establish negligence in the manufacturing process. As discussed in Part II, evidential devices are commonly used to bridge the gap between defect and unreasonable care. A popular device in Canada, as confirmed by the recent appellate decisions discussed under Part V, below, is the "general inference of negligence" derived from *Grant*.<sup>137</sup> Manufacturing defects, especially those involving the presence of foreign elements in food and beverages, sometimes offer a sufficient indication of their origins to support an inference that the defendant made an unreasonable choice at some point in processing its products. In addition, manufacturers have greater access to information relevant to choices made in the usual course of their business (*e.g.*, the inspection and testing processes adopted), and to choices exceptional in nature (*e.g.*, human and mechanical mistakes). In light of this, it seems both fair

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<sup>136</sup> *Supra* note 48.

<sup>137</sup> *Supra* note 40.

and useful to equate a manufacturing defect with negligence, unless an explanation is provided by the defendant compatible with lack of fault; fair, because this device allows a consumer to overcome overwhelming evidential obstacles towards recovery, and useful, because it poses the question to the party best suited to provide an answer. While this approach is commendable, and surely imperative in the absence of an alternative standard of liability, it begets uncertainty and fails to address, in an open fashion, the real concern raised by manufacturing defects: which party, between an innocent consumer and the manufacturer of a product dangerously different from its intended specifications, should support the costs of personal injury and property damage associated with the product's presence in the marketplace? Instead of offering clear and convincing reasons why a defendant manufacturer ought to be liable for manufacturing defects, courts superficially fall back on the notion that liability is justified only when an unreasonable choice is present. Yet they ignore this very issue by inferring almost mechanically negligence from defect. The difficulty is that it is unclear in what circumstances a general inference of negligence or another device may be used and what sort of evidence is required to rebut this presumption. As demonstrated by *Farro*<sup>138</sup> and *LeBlanc*,<sup>139</sup> discussed under Part V, below, the mere presence of a manufacturing defect appears to raise a presumption of negligence and traditional evidence of reasonable care is often ignored. Moreover, in many cases the defendant is in no better position than the plaintiff to offer an explanation for the defective product, beyond pointing to its current inspection and verification systems. The reason for this inability is simple: manufacturing defects are exceptional and cannot adequately be explained unless their exact sources in time and space are determined. Access to information alone does not always permit a manufacturer to overcome this evidential hurdle, intrinsic to the very nature of this type of defect.

By resorting to inferences of negligence despite these difficulties, the common law in this field is, in essence, moving towards recognizing that the act of supplying a product containing a manufacturing defect, in and of itself, constitutes negligence. In other words, the unreasonable choice at the source of the plaintiff's losses is supply. Such a hypothesis is defensible when a manufacturer has actual knowledge that one of its products dangerously departs from its intended specifications, but nonetheless allows that product to enter the market. However, absent

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<sup>138</sup> *Supra* note 17.

<sup>139</sup> *Supra* note 18.

such clear knowledge, equating supply with negligence suggests that a reasonable person in the defendant's position would not have supplied any products, as this is the only way to prevent an unintended departure from specifications to enter the market. The problem with this development is obvious: it labels as unreasonable a choice that will continue to be made, without any modification, as manufacturers are in the business of supplying products. A finding that supply, without more, is negligent thus frustrates one of the traditional aims of the law of negligence. It allows a plaintiff to receive compensation for injuries, but it offers no guidance whatsoever to the defendant and to others as to what conduct ought to have been avoided. In the end, an observer is left with the impression that the concept of negligence is but an empty shell in this area of the law. Courts usually decide it is just to transfer losses caused by manufacturing defects to manufacturers, but their reasons have little to do with lack of reasonable care in the supply of manufacturers' products. In contrast, a rule of strict liability for manufacturing defects forces a court to address directly whether a person who supplies a product that is dangerously different from what that person intended to supply ought to bear the social costs of this product's presence in the market. There may be valid reasons for answering this question in the negative, as discussed under Part V, below, but it should be openly recognized that reasonable care in preventing the injurious outcome is not on this list, neither in theory nor in practice.

The third argument centres on the overall function of the law of torts—to manage and control, as fairly and efficiently as reasonably possible, the personal and social costs of injury and property damage. There is debate in jurisprudence and, most notably, in academic literature with respect to how this role is currently performed, and as to how it should be performed if reform is needed.<sup>140</sup> For instance, is the overriding objective (and if not, should it be) to compensate victims for their losses, to prevent future accidents from occurring, to deter only those accidents which are inefficient in economic terms, to spread the social costs of dangerous activities amongst the people who benefit from them, or simply to apply a set of principles to determine who, in justice, should support a given loss? While there is little consensus on implementation, it seems relatively clear that the general purpose of our law of torts is to deal with accidents in a fair and (somehow) useful

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<sup>140</sup> A useful review of this debate may be found in P. Legrand, Jr., "Le droit des délits civils: pour quoi faire?" in P. Legrand, Jr., ed., *Common law d'un siècle l'autre* (Cowansville, Qué.: Yvon Blais, 1992) 449.

manner. Although the current standard of liability for manufacturing defects is compatible with this function, a rule of strict liability would arguably represent an improvement to the *status quo* both in terms of fairness and of social utility. The hypothesis here is twofold. By officially removing the requirement for proof of negligence, the potential of damages as a mechanism for redress would be significantly increased and manufacturers, as a group, would be more exposed to liability than is currently the case. The reasons for this probable change are the following: (1) the requirement of fault extends the litigation process causing delays, expenses, appeals, and disincentives to bring actions; (2) the evidential shortcuts discussed earlier are not always available to plaintiffs;<sup>141</sup> and (3) it ultimately remains possible for defendants to escape liability by proving that they took all reasonable care in the circumstances to prevent their products from being dangerously different from their intended specifications.<sup>142</sup> If damages and civil liability do indeed become more prevalent under a rule of strict liability, as they should in theory, the dividends would be numerous. First, a fairer treatment of consumers, not only because they would be relieved of a difficult burden of proof, but because a greater number of them would have access to the justice system. Second, a reduction in the transaction costs involved in litigating manufacturer fault. The appeals discussed under Part V, below, centre almost exclusively on the issue of negligence and, in particular, on how an appellate court should reconcile a theoretical requirement of fault with an obvious lack of evidence. The costs involved in litigating whether a product contains a manufacturing defect, whether the defendant is responsible for its supply, and whether the defect caused the plaintiff's damages, are already incurred under the present standard of fault. Third, there would be an improved distribution of the costs associated with dangerous products. The presence of consumer products in the market is beneficial to society as a whole, both directly and indirectly: products offer for consumption the results of manufacturer investment and innovation, and they ensure income to thousands of individuals and businesses. Society should bear part of the costs of personal injury and property damage resulting from

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<sup>141</sup> A general inference of negligence and *res ipsa loquitur* arguably applies only against the manufacturer and not the wholesaler, repairer, or retailer who has less control of the product and its instrumentalities. Moreover, where the defect is caused by a component part manufactured by someone other than the defendant manufacturer, it is more difficult to infer negligence against the latter.

<sup>142</sup> For instance, by arguing that state-of-the-art methods of construction, inspection, and testing were used at all relevant times.

manufacturing defects. A rule of strict liability, imposing the full costs of these defects on those who are in the business of supply (not only the costs associated with actionable negligence), acts as a better conduit for distribution because it causes the prices charged by this group to reflect the full costs of manufacturing defects. This encourages not only loss spreading, but also accident prevention since consumers would be attracted by presumably safer (because they are cheaper) products. Of course, if our only goal were distribution, a better conduit could be adopted such as a general scheme of no-fault compensation funded by taxes. However, besides the forfeiture of individual responsibility and a likely increase in administrative costs associated with such a scheme, the mere existence of a legislative option should not preclude the judiciary from making incremental improvements to the common law, especially when these changes further other, equally important objectives. A fourth possible benefit would be increased manufacturer investment in product safety. Some manufacturing defects cannot be avoided by the exercise of reasonable care. For example, a percentage of beer bottles manufactured in Canada will shatter for no apparent reason, despite the use of state-of-the-art equipment to test bottles and detect flaws. By focusing on reasonable care, our current rule fails to place incentives on manufacturers to go beyond what is usually done in the market and to decrease the number of unexplainable departures from specifications. Increased exposure to liability under the proposed rule would arguably fill this gap in deterrence. The fifth benefit would be a confirmation of a manufacturer's ultimate responsibility for the safety of products placed on the market. Assuming that some manufacturing defects are inevitable (*i.e.*, cannot be prevented short of ceasing supply), who should support the costs of personal injury and property damage associated with their use? A standard of negligence attributes these costs to innocent victims. Arguably, however, such losses should fall on the persons who, for their own purposes, create the risk by releasing their products in the market. This proposition is simply the corollary to the rule of strict liability derived from *Rylands*<sup>143</sup>: a manufacturer would be liable for supplying (instead of bringing on its land) a dangerous object. The notion of "escape" inherent to the rule of *Rylands* is supplied here by the fact that a manufacturing defect is dangerously different from its intended design; that is, in both cases, the object's dangerousness is linked to a departure from the defendant's control. The point is not that manufacturers are at fault, but that they should be assessed for the costs, currently imposed on society, of their pursuit of potentially dangerous

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<sup>143</sup> *Supra* note 104.

activities. And sixth, there would be a confirmation that manufacturers, as a class, are cheaper insurers than consumers. This proposition is based on two facts: (1) manufacturers have more information about their potential exposure for manufacturing defects with any given line of products (*i.e.*, about the number of units that will exceptionally depart from specifications), than consumers have about their chances of suffering personal injury or property damage by using a given product; and (2) manufacturers have, at their disposal, an accessible and competitive liability insurance market, whereas first-party consumer coverage is still exceptional.

The fourth argument in favour of strict liability for manufacturing defects concerns the reliance currently placed on manufacturers. Without embarking on a stale debate as to whether manufacturers create a demand for their products or simply respond to one, the presence of their products in the market (especially when accompanied by publicity) arguably gives rise to a special relationship of confidence between them and consumers—a relationship that, at minimum, entitles the latter to expect to receive what the former intends to supply. A very rough analogy may be made with fiduciary relationships, the characteristics of which are said to be the following: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to (or at the mercy of) the fiduciary holding the discretion or power.<sup>144</sup> Manufacturers have scope for the exercise of discretion in the making of their products. For instance, they must choose designs and warnings and supervise the entire manufacturing process. Their decisions are influenced by consumer demands, customary practices, government regulations, and financial considerations, but they remain ultimately discretionary since manufacturers have the power to choose amongst many equally permissible options during all stages, from conception to supply. Furthermore, subject to regulations, manufacturers can unilaterally exercise that discretion so as to affect consumers' personal interests. As noted, the quantity and quality of information included with a product enhances a consumer's personal autonomy by allowing him or her to make an informed decision about whether, and how, to use a product. Similarly, the care employed in designing and manufacturing a product is vital to respecting the integrity of a consumer's physical and property

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<sup>144</sup> See, for example, *Frame v. Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; and *K.M. v. H.M.*, [1992] 3 S.C.R. 6 at 63.

interests. The choices made during the conception, construction, marketing, and supply of consumer products will thus have a direct impact on these vital interests. That manufacturers have the power to unilaterally affect consumer interests is evident from *Buchan*,<sup>145</sup> where, without violating government regulations, a Canadian pharmaceutical company chose to provide Canadian consumers with less information about the serious side effects of its birth control pill than that provided by its sister company located in the United States, which manufactured an identical product. Finally, consumers as a class are peculiarly vulnerable to or at the mercy of manufacturers with respect to the safety of their products. True, inspection and research may, to some extent, ensure that a product meets minimum safety standards and personal requirements—*caveat emptor*. In many instances, however, these tools are simply incapable of discovering dangerous product defects. For instance, manufacturing defects are usually hidden from a non-expert eye, especially those involving malfunctioning component parts integrated into the observable product. In these cases, reliance is the only alternative to non-purchase. Manufacturers, whether in the business of making pharmaceutical drugs or lawnmowers, are perceived as experts in their respective fields. They are relied upon by the public to keep up with the state of the art and to produce reasonably safe products. This reliance is fed by a disparity in knowledge between these two groups, but also by a disparity of opportunities for inspection and testing, and where there is reliance there is a corresponding vulnerability. This being said, it is arguable that a similar fiduciary relationship exists between manufacturers and consumers, at least with respect to the safety of the products supplied by the former,<sup>146</sup> and that this relationship imposes a duty on the manufacturer to supply products which do not dangerously depart from their intended specifications. This duty is breached when a manufacturing defect materializes and causes damage to person or property. Irrespective of this argument, however, consumers clearly have the minimal (and reasonable) expectation that they will not suffer personal injury or property damage as a result of a product being dangerously different from what it was supposed to be. A manufacturing defect represents a plain violation of this confidence, regardless of whether an explanation consistent with lack of reasonable care can be given for this injurious outcome. The manufacturer responsible for the product's presence in the market ought

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<sup>145</sup> *Supra* note 91.

<sup>146</sup> As noted in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, relationships may be qualified as fiduciary for some purposes, while not for others.

to be similarly responsible for the costs imposed on others by said the breach. By recognizing that supply of a defective product is insufficient to sustain liability, the current rule fails to account for this notion of reliance. The law of negligence fails to recognize that a breach has occurred when a product departs dangerously from its intended specifications—perhaps not a breach of a duty of care, but surely a breach of the confidence fostered by the product’s presence in the market.

## V. TWO MISSED OPPORTUNITIES

*Farrol*<sup>147</sup> and *LeBlanc*<sup>148</sup> illustrate the type of products liability action where our courts ought to recognize that lack of reasonable care is unnecessary for liability in tort. Unfortunately, they also demonstrate the extent to which the Canadian judiciary, while willing to dilute concepts like negligence in order to avoid unjust results, adamantly refuses to take the next logical step of adopting an alternative basis of liability.

In *LeBlanc*, the plaintiff was severely injured when a beer bottle, brewed by the defendant and manufactured by a third party (Consumer’s Packaging Inc.), unexpectedly shattered in his hand. The plaintiff was a volunteer at a beer garden and was in the process of transferring bottled beer into large containers, measuring two feet by four feet, when a bottle he was pushing into the crushed ice and water, neck-first, made a “poof” sound. The bottle broke and the inside of the plaintiff’s left hand was badly cut. According to the trial judge, approximately 18 bottles out of a potential of 48 were in the container at the time of the incident, thereby eliminating blows with adjacent bottles or walls of the tub as the source of the explosion. Further, there was no evidence of abuse, excessive force, or mishandling of the bottle on the part of the plaintiff. The trial judge dismissed the action against Consumer’s Packaging Inc. because there was no evidence to show that the bottle (a component part) was defective when supplied by its manufacturer: “a defect could only be inferred on speculation” and such inference could not be made “on account of the numerous intervening factors which come into play in the total bottling process by the defendant [brewer].”<sup>149</sup> The cause of the

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<sup>147</sup> *Supra* note 17.

<sup>148</sup> *Supra* note 18.

<sup>149</sup> (1993), 130 N.B.R. (2d) 271 (Q.B.) at 279.

explosion was a defect in the product supplied by the defendant, that is, the bottled beer. Regarding the production process, evidence obtained from witnesses demonstrated that, although rare, the explosion of bottles does occur in the bottling process. At some point during the defendant's manufacturing process, the product handled by the plaintiff became particularly vulnerable to pressure and an unreasonable risk of shattering was created. According to the trial judge, "the only reasonable inference is that the defendant was negligent" with respect to this defect.<sup>150</sup> The plaintiff was awarded \$21,666.03 in damages.

The defendant appealed the finding of negligence arguing, *inter alia*, that it had a state-of-the-art inspection process for the detection of defective bottles, that spending a greater amount of money in this respect would undermine its competitiveness in the market, and that it was not an insurer for the products it supplied. Relying on *Grant*<sup>151</sup> and a series of cases inferring negligence from a manufacturing defect of the kind in issue,<sup>152</sup> the New Brunswick Court of Appeal, *per Rice J.A.*, arrived at the following conclusion: "[t]he trial judge made no error in principle when he inferred that the appellant had been negligent *in allowing such a product to reach the hands of a consumer* in the circumstances."<sup>153</sup> Furthermore, the arguments that the appellant had an inspection process comparable to that of other manufacturers and that relatively few bottles explode in the manufacturing process are "not relevant" according to the Court,<sup>154</sup> even when based on economic feasibility.

Compared to *LeBlanc*, the factual background of *Farro* is somewhat less typical of products liability suits involving manufacturing defects. While having their Toronto home renovated, the plaintiffs had a ceiling exhaust fan installed in their bathroom. The fan was manufactured by the defendant, Nutone Electrical Limited (Nutone). The fan consisted of a number of components, including a motor manufactured by another company (UPCO) not involved in the action, and installed into the final product by Nutone. The motor was manufactured according to Nutone's specifications in compliance with the standards set by the Canadian Standards Association (CSA) and had

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<sup>150</sup> *Ibid.* at 277.

<sup>151</sup> *Supra* note 40.

<sup>152</sup> In particular, *Cohen v. Coca-Cola Ltd.*, [1967] S.C.R. 469 at 473, where the Court interpreted the presumption of negligence created by art. 1238 C.C.L.C..

<sup>153</sup> *Supra* note 18 at 293-94 [emphasis added].

<sup>154</sup> *Ibid.* at 294.

been sold in large quantities without any previous problems. In particular, the standard motor was equipped with a thermal fuse designed to cut off power if the coil exceeded a predetermined temperature. In May 1981, according to the trial judge's findings, the fan motor overheated causing the copper windings of the motor coil and the plastic grille to melt and drop onto the plastic toilet seat cover located below the fan. This resulted in a fire which caused smoke damage to the plaintiffs' house and its contents. After the fire, the fan was delivered by the district fire chief to the CSA for inspection. The fan was ultimately destroyed by a CSA employee before Nutone had an opportunity to conduct its own examination, and before Nutone was notified that an action for damages was being pursued by the plaintiffs.

The trial judge eliminated the human and other extraneous causes of the fire suggested by the defendant and concluded, on the balance of probabilities, that the fire was caused when the fan's motor overheated. Sutherland J. noted that the case did not involve "allegations of defective labelling"<sup>155</sup> and found that the plaintiffs failed to establish any defect in the design of the fan or of its motor. The heat build-up in the motor should have caused a properly operating thermal fuse, of the kind stipulated in UPCO's design and approved by the CSA, to cut off the power in time to avoid the melting of the coil and plastic grille. This would have prevented the droppings of boiling copper and plastic and thus would have prevented the fire. It is implicit in the trial judge's reasons that the cause of the fire was the absence of a functional thermal fuse in the plaintiff's fan—a manufacturing defect in the product supplied by the defendant. However, the action against Nutone was dismissed because the plaintiffs had failed to establish precisely how this defect had occurred; that is, they had failed to show that negligence was the reason for the failure of the thermal protection device. According to the trial judge, explanations for this defect which spoke of negligence were a failure to include said device, an improper installation, or an installation despite some observable or latent defect. None of these admittedly unreasonable choices was shown to have been made. Interestingly, none of these choices could be attributed to the defendant since the protective device is built into the coil of the motor manufactured by UPCO and there is no way for Nutone visually to take cognizance of any manufacturing defect in this component part. The case nonetheless proceeded, without objection, on the basis that Nutone would be liable if the fan motor were shown or inferred to have been negligently manufactured by UPCO.

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<sup>155</sup> [1988] O.J. No. 143 (QL).

The Ontario Court of Appeal reversed the finding with respect to liability. According to Lacourcière J.A., writing for the Court, the issue was whether a manufacturer can be liable for a defect in a component part made by another company, integrated into the final product, where the part is destroyed and is not available for testing. In principle, a manufacturer's duty in the making of its products includes a duty to take reasonable care in selecting, inspecting, handling, and assembling all of the product's component parts. The fact that the defect in the motor was not readily apparent to Nutone's naked eye was beside the point, since Nutone accepted responsibility for the damage in the event that there was negligence in the manufacture of the fan motor. The real issue was whether the plaintiffs met their burden of proving negligence. According to Lacourcière J.A., the plaintiffs established a *prima facie* case of defect in the motor by showing that the fire originated in the motor and that a properly functioning thermal protection device would have prevented the fire. Further, the plaintiffs eliminated all possible extraneous causes of the fire. Having made these findings, the trial judge placed, according to the Court of Appeal, "too heavy a burden on the appellants to show *how* the particular defect occurred."<sup>156</sup> The plaintiffs do not have to advance direct evidence that a defect existed when the component part left UPCO's plant, as this would be an impossible burden. They can meet their burden by demonstrating circumstantially that the defect must have been there when the product left the plant, for instance, by showing how improbable it was that some other person was responsible for the hazard after the product left the manufacturer.

There was "ample evidence of sufficient weight and cogency to warrant the inference that, on a balance of probabilities, the supplier of the respondent was *negligent* in omitting to install or improperly installing a defective thermal protection device."<sup>157</sup> In addition, the Court of Appeal held that the trial judge erred in attributing fault for the destruction of the fan after the fire to the plaintiffs, since this destruction was not due to any action of the plaintiffs. The fact that Nutone did not have the opportunity to inspect the fan after the fire should not destroy the plaintiff's claim. Similarly, the argument that the defendant's supplier was deprived of the opportunity of proving that it had properly installed a visibly functioning thermal protection device in the plaintiffs' home was speculative, unsupported by the evidence, and, in any event, irrelevant. Cautioned Lacourcière J.A., "to give effect to such a

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<sup>156</sup> *Supra* note 17 at 642 [emphasis in original].

<sup>157</sup> *Ibid.* at 642 [emphasis added].

speculative defence would undermine the *progressive line of case* which placed liability on the manufacturer of a defective product; this is so even in the case of a latent defect if the manufacturer *failed to rebut the onus on it to disprove negligencē*<sup>158</sup> The appeal was allowed and Nutone was held liable for \$60,000.

My first observation is that both cases clearly deal with manufacturing defects. The plaintiff in *LeBlanc* did not challenge as unreasonable the specifications adopted by either the defendant bottler or by the manufacturer of the bottles in the making of their respective products. Similarly, the plaintiff made no allegation that he should have been warned of the risk of shattering when handling beer bottles. In *Farro*, the plaintiffs did not rely on any failure to warn theory and their argument that the fan's design was defective because it called for a "one-shot" thermal device, instead of a more extensive device that could be tested without destroying its usefulness, was summarily dismissed. Liability in both cases centred on the manufacturers having supplied products dangerously departing from their intended specifications, that is, products containing a manufacturing defect. The beer bottles supplied by Oland Breweries Ltd. do not normally explode when used in a reasonable manner. It was proven that the unit handled by the plaintiff shattered for no distinct reason and caused severe injury to his hand. The plaintiff had proven, by a preponderance of evidence, that the unit handled was different from similar products manufactured by the defendant according to design, and that the difference rendered the product dangerous to a consumer's person. Likewise, the ceiling exhaust fans manufactured by Nutone are designed to include functional thermal protection devices to prevent overheating of the motor. The trial judge found that the fan purchased by the plaintiffs and supplied by the defendant was dangerously different from said specifications, since the unit's safety device did not properly function, causing serious smoke damage. Accordingly, at the core of both *LeBlanc* and *Farro* is a finding of fact that losses suffered by the respective plaintiffs were directly attributable to a manufacturing defect contained in the product supplied by the defendant manufacturers.

The appellate courts in both cases seem to equate these findings of defect (injurious outcomes) with corresponding findings of negligence (unreasonable choices). In keeping with principle, they insinuate that

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<sup>158</sup> *Ibid.* at 644 [emphasis added].

liability in tort is not strict but based on negligence.<sup>159</sup> However, they then pay little attention to the possible explanations for the defects and the care employed by the defendants in supplying their respective products. The courts at both levels in *LeBlanc* effectively overlook why the unit handled by the plaintiff was vulnerable to shattering and, in particular, whether the reason is linked to some unreasonable choice made by the manufacturer or one of its employees. Further, the New Brunswick Court of Appeal notes that the state of the art in the industry with respect to inspection, the low probability and unpredictability of supplying defective bottles, and the feasibility of added measures of prevention—three factors often considered in judging the reasonableness of a defendant's conduct in a non-products liability negligence action<sup>160</sup>—are “not relevant” in determining the manufacturer's liability. In *Farro*, as noted, the Court of Appeal goes so far as to criticize the trial judge for placing much emphasis on “*how* the particular defect occurred,” the very focus of a negligence inquiry. Indeed, the trial judge was on solid ground in requiring evidence of this sort since negligence, as distinct from strict liability, is concerned with unreasonable choices and not simply unacceptable results. If the burden of proof with respect to negligence means anything, it means that a plaintiff must satisfy a trier of fact that it is more likely than not that a defendant made some unreasonable choice in allowing a defective product to be supplied to consumers. In both *LeBlanc* and *Farro*, the evidence adduced by the plaintiffs is directed solely at the existence of a defect, that is, at showing that the products were different from their manufacturer's specifications. No attempt is made by the plaintiffs to explain the flaw in the product and to ground their explanation in lack of reasonable care on the part of the defendant—to show that the defendants should have done something different in the circumstances. In essence, the appellate courts simply substitute a judgment of

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<sup>159</sup> In *LeBlanc*, *supra* notes 18 and 149, the courts at both levels are silent on the impact of section 27 of the *Consumer Product Warranty and Liability Act* S.N.B. 1978, c. C-18.1, which adopts a standard of strict liability under certain circumstances. They proceed on the footing that proof of negligence is required in order to secure recovery. In *Farro*, *supra* note 155, the trial judge noted: “[a]lthough much has been said about how close the law of Ontario has come to strict liability in products liability cases, our law has not taken the final step. Formally, the liability of a manufacturer depends upon a finding that he was negligent.” In the appeal, Lacourcière J.A. observed, *supra* note 17 at 643, that the “trial judge's reasons contain a careful review of the facts and an appropriate distinction between the negligence standard applicable in this case and the standard of strict liability.”

<sup>160</sup> See, for example, A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) at 105-15.

negligence for a finding of defect in the manufacture of bottled beer and ceiling fans.

In fairness, this leap from defect to negligence is not without principle. As noted by the Ontario Court of Appeal, a plaintiff is never required to prove his or her case exclusively with direct evidence. Circumstantial evidence, such as proof of a manufacturing defect in the defendant's product, may offer a solid ground for inferring lack of reasonable care on the part of the defendant manufacturer. That a manufacturer supplies a product dangerously departing from others made according to specifications does speak, at least to some extent, of negligence in the making of its products. In such a case, the argument proceeds, a failure of some sort probably occurred during the defendant's manufacturing process because if employees, machinery, and inspection and testing mechanisms performed according to norm at all times, the product used by the plaintiff would probably have been what it was supposed to be. Thus, absent a showing that someone other than the defendant is responsible for the defect, as was shown by the bottle manufacturer in *LeBlanc*, it seems reasonable to infer negligence from proof of defect. The appellate courts of New Brunswick and Ontario resort to this evidential device in order to overcome the weakness in the plaintiffs' cases with respect to negligence and, in so doing, follow a line of cases alluded to earlier when discussing *res ipsa loquitur* and similar devices.<sup>161</sup> Furthermore, as recognized by Lacourcière J.A. in *Farro*, there are policy reasons supporting such an inference of manufacturer negligence, in particular, the relatively shaky position of the plaintiff in accessing the information required to establish lack of reasonable care.

Having said this, it is evident from the reasons given in both cases that the appellate courts have little genuine concern for discovering whether the defects in issue were the result of negligence. I say this for many reasons. First, although they clearly denote different concepts, the courts use the terms "defect" and "negligence" interchangeably throughout their opinions, hinting that proof of the former is proof of the latter, and not merely a ground supporting a general inference. Second, the task of disproving negligence placed on the defendant manufacturers as a result of the inferences of negligence is not significantly easier than the reverse task placed on the plaintiffs. While a manufacturer does have greater access to information relating to occurrences inside its plant, the likelihood of it being able to provide any explanation of why a particular unit is dangerously different from its intended design, let alone an explanation refuting negligence in this

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<sup>161</sup> *Supra* notes 38-47 and accompanying text.

respect, seems somewhat remote.<sup>162</sup> In my respectful opinion, the courts in *LeBlanc* and *Farro* are motivated less by a concern of placing the burden of proof on the party best able to provide answers, than by a concern of allocating losses associated with unexplainable dangers, such as manufacturing defects in bottled beer and ceiling fans.

Third, in determining whether there was any evidence opposed to an inference of negligence, the courts in both cases disregard factors traditionally considered (if not always given a determining role) in judging the reasonableness of a defendant's conduct. The New Brunswick Court of Appeal finds that the state of the art in the bottling industry with respect to inspection, infrequency, and unpredictability of explosions and the costs of additional measures of prevention are "not relevant" to the issue of negligence. The Ontario Court of Appeal criticizes the trial judge for asking "how" the manufacturing defect occurred, although the reason for a mishap is the very core of any negligence inquiry, and makes no comment about the significance of the fact that it was "impossible for [the defendant] to visually inspect each device to ensure that it was free of observable defects"<sup>163</sup> since the thermal protection device is built into the coil of the motor by the motor manufacturer UPCO. In addition, it was impossible for Nutone to test the "one-shot" protection devices without destroying their validity. Thus, although there was very little, if anything, that Nutone could have done differently in the circumstances to avoid the manufacturing defect, it was held responsible in negligence for the plaintiffs' losses. True, the trial judge noted that Nutone had not "denied responsibility in the event that it is found that there was negligence in the manufacture of the motor."<sup>164</sup> However, considering the irrelevance of conventional vicarious liability, the view shared by both levels of court that strict liability was inapplicable, the way in which the Court formulated the duty of a manufacturer with respect to its products' component parts,<sup>165</sup> the emphasis placed by Nutone on lack of evidence showing negligence in the making of the motor, and the general importance of the case, one

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<sup>162</sup> This is particularly evident in *Farro*, *supra* note 17, where, apart from the fact that the ceiling fan was destroyed by a third party, the Court of Appeal effectively asks Nutone, the maker of the fan, to disprove negligence in the manufacture of the motor, which was a component part made by another company located in Chicago.

<sup>163</sup> *Ibid.* at 640.

<sup>164</sup> *Supra* note 155.

<sup>165</sup> Lacourcière J.A. noted, *supra* note 17 at 640, that a "manufacturer has a duty to take *reasonable care* in the manufacture of his product, including all its component parts, and failure to take such *reasonable care* can result in liability to the ultimate user or consumer" [emphasis added].

would expect the Court of Appeal to comment on the validity of the defendant's apparent concession, if lack of reasonable care is really central to recovery.<sup>166</sup>

Lastly, the conclusion in both cases suggests that the act of supplying a product containing a manufacturing defect is, in itself, negligent behaviour. In other words, regardless of the reasons why the product is flawed, allowing it to enter the market denotes lack of reasonable care on the part of the manufacturer; supply denotes an unreasonable choice. This view is made very clear in *LeBlanc*—where Rice J.A. agrees with the trial judge that Oland “had been negligent in allowing such a [defective] product to reach the hands of a consumer,”<sup>167</sup> despite finding nothing wrong in the defendant's manufacturing process—and it is implicit throughout the reasoning in *Farro*, especially in the Court's ready acceptance of the manufacturer's concession. However, there is a serious problem with equating supply with negligence in this context. Manufacturing defects are, by definition, unintended departures from a manufacturer's specifications. Accordingly, when tort law finds a manufacturer negligent (I am not speaking of liability here) for the mere act of supplying a product containing such a defect, regardless of whether or not someone or something misbehaved at an earlier stage, it is recognizing a norm of conduct impossible to be complied with. It is finding unreasonable a choice that must and will be made by manufacturers in order to stay in business—the choice of allowing goods to enter the market. Of course, manufacturing defects are foreseeable and this is why a duty of care in the making of products has been recognized ever since *Donoghue*.<sup>168</sup> However, negligence goes beyond causing the materialization of a foreseeable result. Negligence is about exercising lack of reasonable care in allowing a foreseeable result to transpire. It is about doing what a reasonable person would not have done in the circumstances, or failing to do what a reasonable person would have done.<sup>169</sup> The law of negligence should accordingly disclose the choices that are unreasonable, and thus open to liability, so that interested parties may plan their behaviour accordingly; it should (and usually does) tell defendants what

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<sup>166</sup> The validity of concessions on important legal issues is often the subject of comment in appellate courts: see, for example, *R. v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 115-16; and *Canson Enterprises Ltdx. Boughton & Co.*, [1991] 3 S.C.R. 534 at 570.

<sup>167</sup> *Supra* note 18 at 293-94.

<sup>168</sup> *Supra* note 2.

<sup>169</sup> *Arland v. Taylor*, [1955] O.R. 131 (C.A.).

should have been done differently in stated circumstances. Since a manufacturing defect is unintended and presumably unknown,<sup>170</sup> a finding of negligence based solely on the product's supply is tantamount to saying that the manufacturer should not have supplied the product at all, or that a reasonable manufacturer would have made another choice in the circumstances—the choice of not allowing any of its products to enter the market.

These observations do not suggest that the defendants in *LeBlanc* and *Farro* should have escaped liability. In my view, the result in both cases is manifestly just. Rather, the point is that liability should have been based on something other than fault. The manufacturers held responsible each supplied, as a matter of fact, a product dangerously departing from its intended design. As a result of the presence of this product in the market, the plaintiffs suffered personal injury (Mr. LeBlanc) and damage to property (the Farros). The probable cause of each loss was the manufacturing defect, the courts having rejected all other possible causes including contributory negligence. As shown, the appellate courts were much more concerned with the presence or absence of such injurious manufacturing outcomes than with choices made throughout the defendants' respective processes that explain these results. This is an appropriate concern. For reasons already given, manufacturing defects are intolerable outcomes in today's society and liability should follow the party (or parties) responsible for causing them regardless of whether an explanation couched in negligence vocabulary can be given. Unfortunately, the appellate courts of New Brunswick and Ontario did not seize these perfect opportunities for openly recognizing what they, and other courts in Canada, have been doing for years in like situations. They failed to make the incremental change to the common law, discussed under Part IV, above, that would ground liability in results rather than choices. Although the holdings in *LeBlanc* and *Farro* are commendable, the opinions given prevent the energy presently spent on the negligence element from being diverted to better purposes, and fail to clarify an area of law that has become increasingly rhetorical.

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<sup>170</sup> Of course, the situation is different when the manufacturer knows that a particular unit is defective. In such a case, a finding of negligence means that the defendant was negligent in allowing the product to reach consumers.

## VI. CONCLUSION

Much has been said about the pertinence of negligence as a basis for liability in Canadian products liability law. In view of the continuing apathy of our provincial legislatures and courts with respect to this issue, and in light of recent developments in the United States where many jurisdictions struggle with the implementation of a general standard of strict liability, this author felt that at least three points could be added to the Canadian debate. First, irrespective of the sound policy arguments favouring a stricter judicial attitude towards manufacturers in tort, pure strict liability appears unworkable in many circumstances. This is so, for instance, when a plaintiff challenges as defective a product design adopted by the defendant manufacturer or the safety information provided by the latter. Since these arguments by definition centre on a choice made by the manufacturer in the supply of its products, they inevitably invite considerations traditionally associated with the law of negligence into their respective analysis of liability, such as cost-benefit weighing and foreseeability of risk. In contrast, when a plaintiff claims that the product unit causing his or her loss is dangerously different from other products manufactured by the defendant according to its own specifications (*i.e.*, when the claim is based on a manufacturing defect), the theory centres on a result and it is possible, if desired, to assign liability regardless of the explanation given for this outcome.

Second, not only is it possible, but it is preferable to disregard the reasonable care exercised by a manufacturer in determining its responsibility for supplying a product containing a manufacturing defect. A *prima facie* case for manufacturer liability ought to exist when a plaintiff demonstrates, on a balance of probabilities: (1) that a product is dangerously different from its intended design; (2) that the defendant is responsible for the defective product's supply; and (3) that recognized damages were caused by this defect. In defence, a manufacturer could perhaps argue that someone else is responsible for the manufacturing defect or that the plaintiff somehow contributed to his or her damages, but reasonable care in preventing this defect ought to be considered immaterial. This principle of strict liability in tort would demand from plaintiff's information that is reasonably accessible to them, it would force a court to address candidly the question of who should bear the costs of unexplainable manufacturing defects, it would represent an improvement to the *status quo* in terms of fairness and social utility, and it would stress that consumer reliance is fundamentally breached

whenever a product is dangerously different from what it was supposed to be.

And lastly, legislative intervention is not necessary in order for this principle to be recognized. As was recently confirmed by the Supreme Court of Canada, courts have both the power and the duty to make incremental changes to the common law to see that it develops in a manner consistent with modern notions of commercial reality and justice. Strict liability for manufacturing defects represents such a development. It is incremental because it is limited to a very specific area of products liability, where courts currently invoke evidential devices such as general inferences of negligence and *res ipsa loquitur* in order to fill the gap between defect and unreasonable care. It is required because, compared to the current rule, it is open, fairer, more useful, and indicative of the very special relationship that exists between manufacturers and the consumers of their products. In keeping with their power and duty to ensure the incremental evolution of the common law, our courts should openly recognize a standard of strict tort liability when faced with litigation involving manufacturing defects. When a plaintiff suffers personal injury or damage to property because of a product dangerously departing from its intended design, liability should be determined, not by asking whether the choices made in leading to this result are reasonable in the circumstances, but by asking who caused this intolerable outcome.